No. 06-__

IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether First Amendment strict scrutiny is required to review the regulation of expressive conduct where the government has not demonstrated that the expression at issue causes adverse secondary effects?

2. Whether a city ordinance regulating sexually-oriented expression may be upheld where the trial court found that the "record is devoid of the existence of even potentially harmful secondary effects?"

3. Whether a reviewing court is required under the First and Fourteenth Amendments to remand for further evidence where it has reversed a mid-trial directed finding of unconstitutionality, and the challenger has not completed its rebuttal of the government's asserted justifications for regulation?

PARTIES TO THE PROCEEDINGS

The petitioners are Pooh Bah Enterprises, Inc., an Illinois corporation; Ace Ent. Co., Inc., an Illinois corporation; Perry Mandera, president of Pooh Bah Enterprises, Inc. and of Ace Ent. Co., Inc.; Lisa D. Sims, Christine E. Hadsall, and Suzanne Lienquist, entertainers and dancers; and Peter Abruzzo, Sr.

The respondents are the City of Chicago, an Illinois municipal corporation; the License Appeal Commission of the City of Chicago; and William D. O'Donaghue, Albert D. McCoy and Irving J. Koppel, Chairman and Commissioners of the Chicago License Appeal Commission.

RULE 29.6 STATEMENT

Pooh Bah Enterprises, Inc., and Ace Ent. Co., Inc., are privately held corporations. None of their shares is held by a publicly traded company.

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois (October 5, 2006), reported at 224 Ill.2d 390 (2006), is included in the Appendix to this Petition, at 1 (hereafter "App."). The unpublished order of that Court denying rehearing (March 5, 2007) is included at App. 64. The dissenting opinion of Justice Freeman to the denial of rehearing, reported at 224 Ill. 2d 390 (March 5, 2007) is included at App. 65.

The unpublished Order of the Appellate Court of Illinois (September 28, 2004) is included at App. 92.

The Memorandum Order and Opinion of the Circuit Court of Cook County Illinois (January 18, 2001) is included at App. 133.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Supreme Court of Illinois pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

Municipal Code of Chicago, § 4-60-140(d):

> "No person licensed under this chapter shall permit any employee, entertainer or patron in any live act, demonstration, dance or exhibition on licensed premises which exposes to public view:
>
> (1) His or her genitals, pubic hair, buttocks, perineum and anal region or pubic hair region; or
>
> (2) Any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or
>
> (3) Any portion of the female breast at or below the areola thereof.

For purposes of this section, any of the items described in subsection (d)(1) through (d)(3) shall be considered exposed

to public view if it is uncovered or less than completely and opaquely covered."

STATEMENT OF THE CASE

In 1993, Pooh Bah Enterprises, Inc. ("Pooh Bah") opened a gentlemen's club (the "Club") in an industrial area on the north side of Chicago. Shortly thereafter, the City of Chicago (the "City") initiated administrative proceedings against it to revoke all of its City licenses, including its retail liquor license. The City charged that Pooh Bah had violated § 4-60-140(d) of the Chicago Municipal Code (the "Coverage Ordinance") by permitting various female dancers at the Club to expose portions of their buttocks and the sides of their breasts to patrons' view.

Pooh Bah unsuccessfully attempted to enjoin the administrative proceeding in the circuit court of Cook County based on its state constitutional attack on the ordinance (the "1993 Case"). The denial of a temporary restraining order was affirmed by the Illinois Appellate Court, but the 1993 Case remained pending during the administrative revocation proceedings before the City's Local Liquor Control Commission ("LLCC").

The Commissioner ultimately entered an order revoking Pooh Bah's Chicago liquor, business and entertainment licenses based on his finding that the company had violated § 4-60-140(d). Pooh Bah appealed to the Chicago License Appeal Commission, which affirmed.

Pooh Bah sought judicial review of the administrative findings and revocations in the circuit court of Cook County, in the still-pending 1993 Case. Pooh Bah later amended its complaint to raise First Amendment and other federal law attacks on the Coverage Ordinance in addition to its state law claims.

The City then promptly removed the 1993 Case to the United States District Court, which remanded the state law issues to the Illinois courts, while retaining the federal constitutional issues. A second removal by the City in 1998 was similarly remanded in 1999. The District Court subsequently dismissed the federal court case.

Shortly thereafter, the City brought a second lawsuit against Pooh Bah (the "1999 Case), in which the City sought to enjoin the Club's business as a "nuisance" under Chicago's general nuisance ordinance. (App. 133.) The Illinois Supreme Court defines a public nuisance as a "public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace or of the general good order and welfare of society." (App. 136.)

The nuisance claim in the 1999 Case was predicated on renewed allegations of the same violations of § 4-60-140(d) as were alleged in the 1993 Case, *i.e.*, exposure of prohibited portions of dancers' buttocks and breasts. In addition, the City alleged in the 1999 Case that a dancer had solicited prostitution at the Club. In defense, Pooh Bah again challenged the constitutionality of § 4-60-140(d), facially and as applied to it, under the Illinois and United States Constitutions.

The 1999 Case went to trial quickly on the City's preliminary injunction request. After the City rested its case and Pooh Bah began to present its evidence, the circuit court granted Pooh Bah's motion for a directed finding. (App. 127, 139.) The circuit court held that the Coverage Ordinance contravened the First and Fourteenth amendments to the United States Constitution and article I, section 4, of the Illinois Constitution of 1970 and therefore § 4-60-140(d) could not serve as a required predicate for a finding that Pooh Bah's Club was a public nuisance (under the City nuisance ordinance). Finding that the City had failed to establish that operation of the Club created a public nuisance in any way,

the circuit court denied the City's motion for a preliminary injunction. (App. 136-42, 153.)

The City then rested its entire case in chief in the 1999 Case, including its defense of the Coverage Ordinance. The parties and the trial court agreed in formal orders: (1) to consolidate the 1993 and 1999 Cases and their evidentiary records, (2) to convert the preliminary injunction directed finding into a final order in both cases, and (3) to stipulate that both parties would retain the right to complete their evidence on remand if the directed finding of unconstitutionality of § 4-60-140(d) were later reversed on appeal. (App. 130) (Consolidation Order); (App. 125) (Partial Judgment Order).

Accordingly, on May 3, 2001, the circuit court entered judgment in favor of Pooh Bah and against the City on the public nuisance claims; reversed the order of the Liquor Appeal Commission affirming the revocation of Pooh Bah's Chicago licenses; vacated the revocation of those licenses; reserved for future consideration various related and subsidiary issues; and made an express finding that there was no just reason for delaying enforcement or appeal. (App. 125-29.)

The City appealed to the Illinois Appellate Court, which held that § 4-60-140(d) of the Municipal Code of Chicago does not violate either the federal or the Illinois Constitution, and reversed the circuit court's constitutional rulings. (App. 92-124.) The court of appeals did not reach the merits of LLCC's decision to revoke Pooh Bah's liquor license. (App. 123-24.) The appellate court remanded for further proceedings on remaining undecided issues.

Pooh Bah then sought and was granted review in the Supreme Court of Illinois. On October 5, 2006, the Supreme Court of Illinois affirmed the decision of the Appellate Court as to the constitutionality of § 4-60-140(d) under the Illi-

nois Constitution and under the United States Constitution. (App. 1.) Pooh Bah then sought rehearing, which was denied on March 5, 2007, over the objection of Justice Freeman. (App. 64-91.) This petition follows.

STATEMENT OF FACTS

Since 1993, Pooh Bah Enterprises, Inc. ("Pooh Bah"), has operated a gentlemen's club in an industrial area adjacent to a rail spur and the Chicago River on the north side of Chicago (the "Club"). The Club presents non-obscene erotic dancing as entertainment.

From the outset of this litigation, Petitioners raised the issue whether Pooh Bah and its dancers have a First Amendment right to present erotic dance performance even though the dancers' buttocks and the sides of their breasts are more scantily clad than the City of Chicago regulations (in § 4-60-140(d)) mandate in establishments licensed to sell alcoholic drinks—or, conversely, whether the City can regulate the body coverage of sexually-oriented live dance performers in City-licensed establishments. In particular, Pooh Bah raised the question whether the City's regulations are content-based or content-neutral, and whether the City had met its burden to show that the regulations were necessary and effective to combat adverse secondary effects. The Coverage Ordinance was adopted by the City in 1978 without legislative findings, but with the stated purpose to "control[] the form of entertainment" in venues that serve alcohol. (App. 157.)

In 1992, before adopting the gentlemen's club entertainment format, Pooh Bah met with the City Zoning Administrator, the Director of the LLCC, the Director of the Illinois Liquor Control Commission, and the district police commander, seeking guidance as to what was permissible. Pooh Bah sought to explain its business plan and to ascertain and resolve any regulatory issues. The LLCC Director was asked

for an opinion concerning the requirements for coverage. [1] The LLCC declined to give an opinion as to what was permissible.

At all times, Pooh Bah has maintained all necessary licenses, including a City liquor license, a City late-hour license, and a City music and dance license. It also has obtained two City amusement licenses that permit Pooh Bah to present stage dancing to its patrons. Because Pooh Bah has a City tavern license, a person under age 21 cannot enter unless accompanied by a parent or legal guardian. (RA. C00407.) The Club occupies a two-level industrial building. The first floor contains a bar, the main stage and two side stages, with tables for patrons. (SR. 00165.) The second floor consists of a large dressing room for the dancers.

Pooh Bah's Club is located in a leased building in a C3-2 commercial-manufacturing zone that permits a nightclub that sells alcohol and features entertainment. The Club also complies with Chicago's 1993 adult use (dispersal) zoning ordinance.[2] (SR. C00410.) The Club is in a non-residential zone. (R. 02848, 02875.) On the west side of Kingsbury Street, across from the Club, the zoning classification was M3-4 (heavy manufacturing) and that property, adjacent to

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[1] (SR. 00417-18.) "SR." denotes the Petitioner's citations to six volumes of Supplemental Record submitted to the Appellate Court of Illinois by agreement of the parties. "R." denotes the Petitioner's citations to the record of proceedings from the Circuit Court of Cook County, Illinois. "RA" denotes citations to the Record on Appeal submitted by the City to the Appellate Court of Illinois. Record citations that include a "C" prefix refer to filings.

[2] The City's "adult use" zoning regulations adopted in 1993 are not at issue in this case. At all times, Pooh Bah has been in compliance with all City zoning regulations. In 2004, Chicago adopted a new comprehensive zoning ordinance that altered the designations of its zoning districts. However, this did not change the zoning treatment of the area where Pooh Bah is located. For the sake of clarity, where this petition refers to zoning designations it uses the ones that were in effect from 1955-2004.

the Chicago River, was improved with a zinc factory. (*Id.*) Adjacent to the Club on the north, south, and east are manufacturing and commercial uses. To the north are primarily drink and entertainment venues. (SR. 00406-07; R. 02853, 02875-77.)

Pooh Bah's entertainment format features several female entertainers dressed in gowns, dresses or pant suits performing a dance show to a set of three songs on the main stage. (R. 158-59.) During the first two songs, the dancers typically remove some of their clothing so that during the third song each is wearing a thong covering below the waist and latex rubber covering portions of their breasts. (*Id.*) After the group stage dances, the dancers are available for dances that are performed adjacent to a patron's table for a tip, usually $20 per dance. (R. 00160, 00166.)

Pooh Bah's Club does not present nude entertainment and has never sought to present total nudity. This litigation has focused entirely on the City's claim that the dancers' buttocks and the sides of their breasts were not sufficiently covered. The trial court found that there was no violation of the requirements for breast coverage, App. 136-39, but the Illinois Supreme Court adopted a more expansive construction of the Coverage Ordinance. (App. 121-23.)

As noted above, this case has a long procedural history. The appeals that are before this Court stem from two separate City efforts to enforce the body coverage requirements of § 4-60-140(d) by shutting down Pooh Bah or by enjoining Pooh Bah's business: (1) the 1993 license revocation administrative action and (2) the 1999 injunction action.

The City has also abandoned several factual claims and legal theories along the way. The City had initially included an "obscenity" claim under the Illinois statute, which it dropped early in the 1993 Case. (R. C1163.) During the trial in 1999-2000, the City made strenuous efforts to show that

Pooh Bah's dancers' breasts were not covered "opaquely" but that charge was explicitly abandoned mid-trial. In addition, the City originally alleged that the presence of the Club depressed property values in the area, but subsequently dropped this claim.

The 1999 (nuisance) Case went to trial on the City's preliminary injunction motion. During the incomplete trial, the trial court heard 15 witnesses for the City before it rested, and 13 witnesses for Pooh Bah, which did not finish presenting its case when a directed finding was entered that the Coverage Ordinance is unconstitutional. In a written decision, App. 133, 147, the trial court concluded, *inter alia*:

> [T]he City has not even come close to demonstrating the existence of or even the possibility of the existence of these effects. The Court finds the record devoid of any proof of the existence of even potentially harmful secondary effects.

The 1999 trial covered two main issues: (1) the constitutionality of the City's Coverage Ordinance and (2) the City's charge that a Club dancer had solicited two undercover police officers for prostitution. (R. C00003.) After hearing testimony from, among others, the officers and the accused dancer (a computer-studies masters degree candidate at DePaul University), the trial judge rejected the City's solicitation claim, and concluded that "undercover police officers . . . tried to entrap the dancers in attempt to show prostitution and solicitation. According to the clear evidence presented . . ., the dancers were not interested. The police tried using video cameras in their neckties—James Bond style—to show violations. That failed too." (App. 142.) The City did not appeal this issue.

The City appealed the constitutional rulings and the Illinois Appellate Court reversed the trial court. The appellate panel held that intermediate scrutiny was the appropriate First Amendment standard of review. (App. 109-11.) The Appel-

late Court found it "entirely reasonable and rational for the City to conclude that combining alcohol with nudity produces adverse secondary effects . . . even in the absence of specific studies on the matter." (App. 112-14.) Nevertheless, it remanded the matter for further determinations by the trial court. (App. 122-24.)

The Illinois Supreme Court affirmed, and rejected Pooh Bah's claim that it should be permitted to introduce additional evidence on remand on the secondary effects issues. Instead, the Court held that "the constitutionality of the ordinance is no longer subject to dispute." (App. 63.) Applying intermediate scrutiny review, the court stated "that liquor and sex are an explosive combination is a proposition so frequently confirmed by human experience that it can scarcely be questioned." (App. 37) (citations omitted) Notwithstanding the findings of the trial court, the Illinois Supreme Court concluded "that the evidentiary record . . . supported the proffered rationale for the ordinance." (App. 27.)

Justice Freeman dissented from the court's denial of rehearing. In contrast to his earlier vote to affirm the appellate court, Justice Freeman wrote that the City had not shown that the Coverage Ordinance has a content-neutral purpose, and that the appellate courts had upheld the law based solely on anecdotal evidence of supposed primary effects of the combination of alcohol and live erotic entertainment. (App. 65-66, 68.) Additionally, he disagreed with the majority because the court failed to give weight to the circuit court's finding that the record was devoid of proof of adverse secondary effects, and had cut off Pooh Bah's right to present evidence challenging the City's justifications. (App. 71-77.)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE THAT HAS DIVIDED THE CIRCUIT COURTS CONCERNING THE APPROPRIATE LEVEL OF SCRUTINY IN EVALUATING CONTENT-CORRELATED REGULATION OF SEXUALLY-ORIENTED EXPRESSION

This Court has held consistently that when government regulation of sexually-oriented speech is predicated on the content of expression, it must be subjected to strict First Amendment scrutiny. *United States v. Playboy Entertainment Group*, 529 U.S. 803, 811, 814-815 (2000) (Where "[t]he overriding justification for the regulation is concern for the effect of the subject matter on . . . viewers, [a regulation] is not 'justified without reference to the content of the regulated speech'" and must satisfy strict scrutiny.); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) ("the Constitution demands that content-based restrictions on speech be presumed invalid").

The basic constitutional principle applies equally to efforts to regulate expressive conduct, *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992), including adult entertainment and erotic dancing, where the regulation is content-based. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) ("If the regulation were content-based, it would be considered presumptively invalid and subject to strict scrutiny."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) ("If the government's interest is related to the content of expression . . . then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard."); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46-47 (1986) ("regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment").

As a "specific exception" to this bedrock rule, this Court has subjected regulations of expressive conduct only to intermediate constitutional scrutiny where they were adopted not to restrict speech but to combat content-neutral "secondary effects" of expression. *RAV v. St. Paul*, 505 U.S. at 394. This exception has been articulated most frequently in the context of adult entertainment regulations and zoning restrictions. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S 50 (1976); *City of Renton*, 475 U.S. at 47; *Alameda Books, Inc.*, 535 U.S. at 434; *Pap's A.M.*, 529 U.S. at 289; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

While the "secondary effects" exception is well established, it is neither well understood nor consistently applied. As this Court observed in *Renton*, ordinances that treat "theatres that specialize in adult films differently from other kinds of theatres" do not "fit neatly into either the 'content-based' or the 'content-neutral' category." *Renton*, 475 U.S. at 47. More recently, several Justices have begun to question the shorthand designation of such ordinances as "content-neutral." *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring) ("The Court appears to recognize that the designation was something of a fiction" that "is perhaps more confusing than helpful."); *id.* at 457 (Souter, J., dissenting) ("It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own" such as "content correlated."). *See Joelner v. Village of Washington Park*, 378 F.3d 613, 621 (7th Cir. 2004) ("'content neutrality' is a concept easily and oft confused").

Because of this doctrinal ambiguity, it often is difficult to determine when a "content correlated" restriction on expressive speech may be subject only to intermediate scrutiny as opposed to strict scrutiny. In cases involving such laws, the First Amendment does not permit the government to presume that expressive conduct falls into a "proscribable category."

RAV v. St. Paul, 505 U.S. at 394; *Virginia v. Black*, 538 U.S 343, 365-366 (2003). To the contrary, the presumption runs the other way. The First Amendment requires reviewing courts to be skeptical of any attempts to discriminate between speakers or messages based on content. *See Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-593 (1980); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). This Court has held emphatically that the government bears the burden of proof, regardless of the level of scrutiny. *Black*, 538 U.S. at 367 (presumption that cross burning is "intended to intimidate" is "unconstitutional on its face" because "[t]he First Amendment does not permit such a short cut.").

Specifically with regard to adult entertainment, this Court has held that the government "bears the burden of proving evidence that supports a link between . . . such operations and asserted secondary effects." *Alameda Books*, 535 U.S. at 437 (plurality op.); *id.* at 449 (Kennedy, J., concurring) ("a city must advance some basis to show that its regulation has the *purpose and effect* of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact") (emphasis added). *See also R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004) ("only after confirming that a zoning ordinances's purpose is to combat the secondary effects of speech do we employ *Renton's* intermediate scrutiny test").

This Court has not yet clarified when a government that has failed to meet its burden of proof with respect to secondary effects necessarily must satisfy strict scrutiny to support a content-based regulation of speech. For example, the district court in *Alameda Books* subjected the Los Angeles ordinance at issue there to strict scrutiny after the city failed to substantiate its "content-neutral" justifiations, but the court of appeals affirmed on different grounds, and the issue was not presented to this Court. *Alameda Books*, 535 U.S. at 433.

See Alameda Books, Inc. v. City of Los Angeles, No. CV 95-7771-DDP (C.D. Cal., May 28, 1998) ("the City's failure to demonstrate a genuine issue of fact as to the content-neutral justification . . . requires analysis of the ordinance as a presumptively invalid prior restraint"). As a consequence, lower courts lack meaningful guidance for when they must apply strict scrutiny in cases involving sexually-oriented expressive conduct.

In this case, for example, the Illinois Supreme Court upheld the Chicago ordinance under intermediate scrutiny. (App. 25-30, 36.) It did so despite the fact that the city council offered no contemporaneous legislative findings for the Coverage Ordinance to support the 1999 claim that it was intended to combat secondary effects, and notwithstanding legislative history that suggested that the purpose underlying the ordinance was content-based. *See* Journal of the Chicago City Council, January 17, 1978, at 722 (Report of the Committee on Police, Fire and Personnel, recommending the approval of the coverage ordinance because it "controls the form of entertainment" in liquor venues). (App. 157.) The Illinois Supreme Court cited the preamble to the later-enacted 1993 zoning ordinance as a statement of legislative purpose, App. 35, 36, but as Justice Freeman observed, "[t]he findings on which this court's opinion relies focus on the City's justification for enacting the [1993] *zoning* restrictions, rather than for the earlier-enacted coverage ordinance." (App. 79) (Freeman, J. dissenting) (emphasis in original).

Evaluating the City's proffer of post-enactment evidence of secondary effects, the trial court below held that the record was "devoid of any proof of the existence of even potentially harmful secondary effects." (App. 76.) Nevertheless, the appellate courts disregarded this finding, concluding instead that "it can scarcely be questioned" that "liquor and sex are an explosive combination." (App. at 37.) (citations omitted)

Justice Freeman examined this rationale and reasoned that the majority's conclusion should have triggered analysis "of whether strict scrutiny review is applicable in this case" because the decision rested on "anecdotal evidence of the supposed *primary* effects of the combination of alcohol and live seminaked dancing on its viewers." (App. 68) (Freeman, J. dissenting) (emphasis in original). *Compare Playboy Entertainment Group*, 529 U.S. at 811 ("The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. . . . This is the essence of content-based regulation."); *Pap's A.M.*, 529 U.S. at 291 (Erie did not "attempt to regulate the primary effects . . ., *i.e.*, the effect on the audience of watching nude dancing in its ordinance"); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("[t]he emotive impact of speech on is audience is not a 'secondary effect'"). However, the Illinois Supreme Court majority dismissed this argument regarding the appropriate level of scrutiny in a cursory footnote. (App. 26)

The decision below in this case illustrates how a general lack of guidance has spawned a conflict among lower courts, including the federal circuit courts, about how to analyze the appropriate level of scrutiny and the nature of the evidence courts should examine. For example, unlike the Illinois Supreme Court in this case, the Eleventh Circuit rejected the argument that reviewing courts "should simply assume that the legislature's purpose was to combat the negative impact on health, safety, and welfare allegedly caused by venues that provide nude dancing." *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1282-83 (11th Cir. 2001). *See also G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark*, 83 S.W.3d 98, 102-103 (Mo. 2002) (court was unwilling "to presume that the City enacted [a regulation of erotic dancing where liquor is served] to prevent negative secondary effects," and therefore concluded that "the City had the heavy burden of justifying the ordinance under strict scrutiny"). Similarly, the Third Circuit rejected the application of *Renton* to a content-

based adult use zoning restriction and applied strict scrutiny after finding that "a regulation that singles out non-obscene sexually explicit material because of its impact on minors is not content-neutral." *U.S. Sound & Service Inc. v. Township of Brick*, 126 F.3d 555, 559 (3d Cir. 1997) ("[t]he impact of protected speech on minors is a direct, rather than a secondary, effect").

By contrast, other circuits have adopted intermediate scrutiny as the presumptive standard of review for otherwise content-based regulations of erotic expression. In *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 309 (5th Cir. 2007), the Fifth Circuit held such a regulation content neutral even though the regulation itself "references content" and "even without a legislative record to suggest a purpose unrelated to speech." It used intermediate scrutiny to review an ordinance that prohibited sexually oriented businesses from obtaining or renewing licenses to serve alcohol, even though the court also found that "there simply is *no evidence*" to support a link "between the combination of alcohol service and erotic dancing and negative secondary effects." *Id.* at 310, 313 (emphasis in original). Similarly, in a case cited by the Illinois Supreme Court below as its principal authority, the Seventh Circuit found that "state regulations prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments *must* be analyzed in light of *American Mini Theatres* and *Barnes*, as modified by their respective progeny." *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 712 (7th Cir 2003) (emphasis added). *See also Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 644 n.3 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272, 273 (11th Cir. 1995) (*per curiam*), *cert. denied*, 517 U.S. 1156 (1996) (intermediate scrutiny applies to ordinance limiting adult entertainment even if it is "specifically aimed" at the expressive activity of a particular individual).

The circuit courts also are divided on the related question of whether a municipality can use post-enactment evidence alone to satisfy *Renton*'s burden to show the predominant purpose of a "content correlated" ordinance is to combat secondary effects. *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2d Cir. 2007) (requiring "pre-enactment evidence" and collecting circuit cases discussing this requirement); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251, 1268 (11th Cir. 2003) ("this Court has consistently interpreted *Renton* to require pre-enactment evidence"), *cert. denied*, 541 U.S. 988 (2004). *But see Illusions-Dallas Private Club, Inc.*, 482 F.3d at 310 (no pre-enactment record is required for "content-neutral" treatment); *Phillips v. Borough of Keyport*, 107 F.3d 164, 178-179 (3d Cir. 1997) (en banc) ("[W]e believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of governments."), *cert. denied*, 522 U.S. 932 (1997); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829-30 (7th Cir. 1999) ("[A] municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted its ordinance."), *cert. denied*, 529 U.S. 1067 (2000).

In sum, this Court's guidance is sorely needed on a question that goes to the heart of the First Amendment's prohibition of content-based regulation of protected expression. This is a critical issue, both because of the significant number of cases in federal and state courts involving the regulation of adult entertainment, and because content-based regulations with assertedly neutral purposes may be used as "a covert attack on speech" unless there are adequate safeguards. *Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring). Accordingly, this Court should grant review.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER REGULATION OF EROTIC ENTERTAINMENT IS CONSTITUTIONALLY PERMISSIBLE WHEN THE "RECORD IS DEVOID OF THE EXISTENCE OF EVEN POTENTIALLY HARMFUL SECONDARY EFFECTS" AND THE CHALLENGER IS NOT GIVEN A FULL OPPORTUNITY TO CHALLENGE THE GOVERNMENT'S JUSTIFICATION FOR THE LAW

This Court has upheld the constitutionality of local ordinances regulating adult entertainment in a number of cases, *e.g.*, *Alameda Books, Inc.*, 535 U.S. 425 (zoning, anti-concentration); *Pap's A.M.*, 529 U.S. 277 (nudity); *Barnes*, 501 U.S. 560 (nudity); *Renton*, 475 U.S. 41 (zoning); *Young*, 427 U.S. 50 (zoning), but these decisions have not produced a clear body of law. But while *Renton* produced a majority opinion, subsequent cases that have attempted to apply its teachings have resulted in sharply conflicting pluralities. *See, e.g.*, *Barnes*, 501 U.S. at 562 (three Justice plurality); *Pap's A.M.*, 529 U.S. at 282 (four Justice plurality). *See also Young*, 427 U.S. at 52 (four Justice plurality). The cases have focused on the legislative justifications proffered and the evidence presented to support the conclusion that the regulation was necessary and effective to combat adverse secondary effects.

Most recently, this Court has sought to clarify that when a challenger succeeds in casting doubt upon a city's justification for such an ordinance, the burden of proof shifts back to the government. *Alameda Books*, 535 U.S. at 439. *See id.* at 453 (Kennedy, J., concurring) ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny."). However, it has not yet explained the point at which there is sufficient "doubt" about the government's asserted rationale to require it to present

additional evidence, or whether a reviewing court may cut short a challenger's ability to present evidence questioning the proffered reasons for the law. Because there is significant disagreement among the lower courts on these issues, this Court should grant review in this case.

A. Review Should Be Granted Where the Trial Court Found That the Record is Devoid of Evidence of Harmful Secondary Effects

It is the City's burden to demonstrate that a proposed regulation of expressive conduct is intended to combat adverse secondary effects. Typically, local governments are permitted to point to a wide variety of materials to support such a claim, including the text of the ordinance, legislative findings or preamble, or any studies or findings about which the legislators were aware. *Alameda Books*, 535 U.S. at 438. However, local governments are not permitted to get away with "shoddy data" to support such laws, and where a challenger succeeds in casting doubt about the justifications for the law, the government must provide credible evidence to support the law. *Id.* at 439.

This case presents the issue of whether a City regulation of expression may be upheld when a trial court finds that there is *no* evidence of harmful secondary effects emanating from the regulated expressive activity (after the government rested its case). (App. 147.) There was no statement of purpose for the 1978 Coverage Ordinance—apart from the description that it was designed to control the "form of entertainment" where alcohol is sold—and no legislative findings. Instead, the Illinois Supreme Court pointed to legislation adopted 15 years later, *i.e.*, the preamble of "a package of ordinances and ordinance amendments adopted in 1993 to establish 'adult uses' within various zoning districts in the City" as supporting the existence of secondary effects. (App. 32.) *But see* App. 77 (Freeman, J., dissenting) (1993 zoning ordinance

"adopted location and dispersion regulations for adult uses in the city").

None of this Court's prior cases directly address this situation. For example, in *City of Erie v. Pap's A.M.*, the plurality opinion accepted the city's rationale that the regulation of nude dancing was necessary to prevent adverse secondary effects, but acknowledged that "Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings." *Pap's A.M.*, 529 U.S. at 284. Likewise, in *Alameda Books*, the plurality opinion focused on a study done by the city as a basis for justifying a zoning restriction on the location of adult entertainment establishments. However, according to the plurality neither the challenger nor the dissenting opinions offered data or competing theories to undermine the study upon which the city relied. *Alameda Books*, 535 U.S. at 437. Still, the case was remanded for further evidence on these factual issues.

This case thus poses the threshold question of whether a city ordinance may be upheld where the trial court has held that the record is "devoid of any proof of the existence of even potentially harmful secondary effects." (App. 76.) In addition, both Illinois reviewing courts below upheld the ordinance without requiring any evidence that the additional covering of the buttocks (or sides of breasts) required by the Chicago ordinance would have the slightest effect on secondary effects or that there had been any adverse secondary effects in the many years that the Club operated.

In this case, the government's justifications unraveled throughout the course of the litigation. The City initially claimed lower property values and community deterioration as adverse secondary effects to be targeted by the Coverage Ordinance, but later abandoned any claim that such effects were at all "associated" with the gentlemen's club. No evidence was presented to support the City's claims regarding

lower property values. It also argued that the ordinance was necessary to combat crime—prostitution in particular—but the City could not show an increase in such activity in the vicinity of the Club. The City also failed in its attempt to use undercover police to entrap the dancers. (App. 142.) Given the City's evidentiary failures and shifting rationales, this case places in bold relief the question left open in *Alameda Books*: What must a challenger do to "cast doubt" upon a city's assertions that a law is needed to combat adverse secondary effects?

The absence of the targeted secondary effects presents fundamental questions of First Amendment jurisprudence that the Court has not clearly addressed, and on which it has not provided guidance to the lower courts. Clarification of the government's burden, and of the effect of rebutting evidence on these threshold points by a challenger would provide valuable guidance to the lower courts as well as to local governments and the erotic entertainment industry. This is an especially pervasive issue throughout the country in light of the decades of local regulation of adult enterprises, especially the "adult zoning" ordinances adopted following *Renton* and the regulation of erotic dancing after *Barnes*.

B. This Court Should Grant Review Where Appellate Courts Cut Short Petitioners' Ability to Present Evidence Challenging the City's Justifications for the Law

This case also presents an important procedural question of First Amendment litigation: whether reviewing courts can rule in favor of the government—and "finally" uphold a law regulating expression—without allowing completion of the trial. This issue is acute in a case like this, where the Illinois reviewing courts refused to allow the challenger to complete its evidentiary attack on the government's *prima facie* justification (taking those courts' rulings to be, in effect, a

finding that the City made out a *prima facie* case for the ordinance).

The trial court in this case granted Pooh Bah's motion for a directed finding before Pooh Bah completed presenting its case. The directed finding order was "subject to reservations by all parties of their respective rights to present additional evidence if these motions are not finally dispositive." (App. 126.) Reversing the trial court's conclusion on an incomplete record, the Illinois reviewing courts upheld the constitutionality of the challenged ordinance without allowing Pooh Bah a full opportunity to rebut the City's evidence. (App. 63.) At the very least, Pooh Bah should have been able to finish presenting its evidence before the fact-related issues were "finally" decided against it.

In *Alameda Books,* the Court remanded the case for a trial for the City to prove the adverse secondary effects that it asserted. Justice Kennedy, concurring in the judgment, concluded by noting that if the City's "assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." 535 U.S. at 453. Here, however, the court below cut off petitioner's right to present additional evidence and simply decreed that "the constitutionality of the ordinance is no longer subject to dispute." (App. 63.)

Given its unfinished evidentiary record, this case presents a far more onerous judicial treatment of First Amendment rights than this Court has previously confronted in dealing with issues concerning adult entertainment. May an appellate court uphold a regulation of the amount of covering worn by dancers when a trial court finds that there is no evidence whatsoever of any harms and without remanding for completion of the trial? In *Alameda Books*, the plurality opinion stressed that the secondary effects doctrine does not mean "that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support

the municipality's rationale for its ordinance." *Id.* at 438-39. But if challengers cannot present their rebuttal of a municipality's evidence, then municipal regulation will win by default even if its justification is shoddy or presumptive.

In addition to the First Amendment problem set forth in *Alameda Books*, the denial of Pooh Bah's right to present its remaining evidence on the secondary effects issues raises a serious due process question under the Fourteenth Amendment. As this Court has made clear, such due process questions raised in First Amendment cases "assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). *See Hudson v. Chicago Teachers Union Local No. 1*, 475 U.S. 292, 303 n.12 (1986) ("[P]rocedural safeguards often have a special bite in the First Amendment context.") (quoting G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1373 (10th ed. 1980)). Accordingly, this Court should grant review of this important question.

C. Lower Courts Are Divided on the Nature and Extent of Proof Necessary to Support Local Regulation of Sexually Oriented Businesses

This case presents an issue of national importance because cities across the country have laws regulating adult entertainment establishments. As a consequence, review would provide essential guidance and clarification as to the type of regulations that are permissible and the amount of evidence required to sustain them. Such guidance is needed because a significant split in the lower courts has developed on exactly these issues.

Some lower courts have invalidated adult entertainment regulations when there is no evidence to support them. For instance in *Flanigan's Enterprises, Inc. v. Fulton County, Georgia*, 242 F.3d 976, 985 (11th Cir. 2001), the court noted that there must be "some factual basis for the claim that

[adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity." (quoting *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir. 1982)). The court invalidated the local ordinance and concluded: "Defendants may not ban nude dancing in establishments licensed to sell liquor without any factual basis to support the claim that these establishments are connected with negative secondary effects." 242 F.3d at 987.

The Eleventh Circuit's approach as articulated in *Flanigan's Enterprises* is directly in conflict with that of the Seventh Circuit in *Ben's Bar*, which was the principal authority upon which the Supreme Court of Illinois relied. (App. 22-48.) *See Ben's Bar*, 316 F.3d at 726. The Eleventh Circuit struck down a regulation of nudity in an adult entertainment establishment because of the lack of evidence of harmful secondary effects, *Flanigan's Enterprises, Inc.*, 242 F.3d at 985-87, while the Seventh Circuit upheld such a regulation despite the absence of any evidence of harmful secondary effects emanating from erotic dancing. *Ben's Bar*, 316 F.3d at 726. The Illinois Supreme Court wholly embraced the Seventh Circuit's analysis. (App. 30.)

Contrary to the decision below, other courts have invalidated ordinances because of the lack of proof of harmful secondary effects. The Fifth Circuit recently overturned a district court's ruling upholding a regulation of alcohol service at an erotic dancing club and stressed that "there simply is *no evidence*, and the State has not met the minimal evidentiary burden placed upon it." *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d at 313 (emphasis in original). In another case, the Fifth Circuit similarly invalidated a zoning ordinance regulating adult entertainment and concluded "[b]ecause there is no such evidence in the record, we must strike down the zoning provision of the Ordinance." *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 295 (5th Cir. 2003).

In sharp contrast, other courts, like the Seventh Circuit in *Ben's Bar* and Illinois appellate courts in this case, have upheld ordinances regulating adult entertainment without requiring proof of harmful secondary effects. *See, e.g., Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572 (Ky. 2001).

Even within some reviewing courts, there have been marked inconsistencies between panels as to the required evidentiary burdens. The Seventh Circuit, which guided the Illinois courts' decision below, is a prime example. In *R.V.S., L.L.C. v City of Rockford*, 361 F.3d 402 the court invalidated Rockford's adult zoning ordinance for lack of justifying evidence and noted that the regulation of exotic dancers "targets speech itself." *Id.* at 414. In contrast, in *Ben's Bar*, 316 F.3d 702, the Seventh Circuit upheld an hours of operation ordinance on the bare presumption that there would be adverse secondary effects where exotic dancing and alcohol are combined. *Id.* at 725-726. The starkly inconsistent treatment of the evidentiary burdens in such cases, even within the same circuit, cries out for this Court's guidance.

CONCLUSION

This Court should grant review to clarify these First and Fourteenth Amendment issues that constantly recur throughout the country and that have produced significant splits of judicial opinion. For the foregoing reasons, Petitioners respectfully request that this Court grant review of this case.

Respectfully submitted,

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No. (2)

In The

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., et al.,

Petitioners,

v.

CITY OF CHICAGO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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865 N.E.2d 133

Supreme Court of Illinois.

The CITY OF CHICAGO, Appellee,

v.

POOH BAH ENTERPRISES, INC., et al., Appellants.

No. 99804.

Oct. 5, 2006.

Dissenting Opinion Upon Denial of Rehearing March 5, 2007.

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Freeman, Fitzgerald, Kilbride, and Garman concurred in the judgment and opinion.

Justice Burke took no part in the decision.

OPINION

Section 4-60-140(d) of the Municipal Code of Chicago prohibits establishments licensed to serve alcoholic beverages from permitting any employee, entertainer or patron to engage in "any live act, demonstration, dance or exhibition * * * which exposes to public view * * * [h]is or her genitals, pubic hair, buttocks * * * or [a]ny portion of the female breast at or below the areola thereof." The issue we are asked to resolve today is whether this ordinance violates the first and fourteenth amendments to the

United States Constitution (U.S. Const., amends. I, XIV) and article I, section 4, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §4). The circuit court of Cook County found that it does. The appellate court concluded that it does not. Nos. 1-01-0592, 1-01-1932 cons. (unpublished order under Supreme Court Rule 23). For the reasons that follow, we affirm the judgment of the appellate court.

The events which gave rise to this appeal began in 1993, when the Liquor Control Commission of the City of Chicago initiated administrative proceedings against Pooh Bah Enterprises, Inc. (Pooh Bah), to revoke various municipal licenses which had been issued to the company, including its municipal retail liquor license. The challenged licenses had been issued to the company in connection with its operation of a so-called "gentlemen's club" located at 1531 North Kingsbury Street in the City of Chicago.[1] The basis for the revocation was that the company, by and through its agents, had permitted various female dancers at the club to expose their buttocks or portions of their breasts at or below the areola to public view in violation of section 4-60-140(d) of the Chicago Municipal Code.

The record shows that Pooh Bah was originally owned by an individual named Jim Levin. Under Levin's ownership, Pooh Bah operated the club as the "1531 Club." When Levin began experiencing financial problems, Perry Mandera, owner and president of a Chicago-area-based shipping company known as The Custom Companies, lent

[1] According to testimony presented in the circuit court, the term "gentlemen's club" denotes a commercial establishment where, for a fee, patrons can watch live dancing by nude or seminude women.

him $300,000 in exchange for a security interest in 50% of Pooh Bah's stock. Mandera subsequently lent Levin an additional $500,000 to finance improvements to the club undertaken in connection with its becoming a franchisee of a chain of "strip" clubs operated by Michael J. Peter Club Management, Inc., under the name "Thee Dollhouse."

Prior to the switch to the Thee Dollhouse format, no nude or seminude dancing was performed at the club. Strippers did not appear until the club became affiliated with the Michael J. Peter organization. Unfortunately for Levin, the introduction of strippers did not bring financial solvency, and he was unable to repay Mandera the money he owed. Mandera ultimately took over full ownership of Pooh Bah through an entity he owned called Ace Entertainment.

According to his testimony, Mandera, through Ace Entertainment, became the sole owner of Pooh Bah and thus the strip club in the summer of 1993. After taking over, Mandera terminated the club's connection with the Michael J. Peter organization. In place of that company, Mandera, through Pooh Bah, entered into management and licensing agreements with Frederick John "Rick" Rizzolo, owner of a Las Vegas strip club known as "The Crazy Horse Too." Rizzolo became active in the management of Pooh Bah's club in 1995, while the license revocation proceedings were still pending.[2] For his services, Rizzolo was paid $20,000 per month, plus travel expenses.

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[2] Mandera required management assistance because he had no experience running strip clubs. Interestingly, Thomas Bridges, the person Mandera hired to be the club's general manager when Rizzolo entered the scene, had no such experience either. Prior to going to work for Mandera, Bridges had been a detective with the Chicago police

(Continued on following page)

Under Rizzolo's regime, the club dropped the name "Thee Dollhouse" and began operating under the same name as Rizzolo's club in Las Vegas, "The Crazy Horse Too." Mandera explained that he affiliated his club with Rizzolo because, when he came across The Crazy Horse Too in Las Vegas, "[he] liked what they did." He was impressed by the club's success and its desire to expand into other cities. According to Mandera, Rizzolo was willing to give him a far better financial arrangement than the one Pooh Bah had with the Michael J. Peter organization. Being affiliated with Rizzolo also provided Pooh Bah with access to the same pool of dancers Rizzolo used. In addition, Mandera testified that Rizzolo "seemed like a very nice person and operated a nice, up-scale operation * * * ."[3]

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department. Joe Pascente, one of the club's assistant managers, had also been associated with the police department. He was a probationary officer, but was fired for failing to disclose that he was the subject of an FBI investigation into insurance fraud involving his father, Fred Pascente. That investigation ultimately led to Fred's conviction on federal mail fraud charges. As with Bridges, Fred had been a Chicago police detective. Fred Pascente is now listed in the Nevada Gaming Commission and State Gaming Control Board's "Black Book" of excluded persons based on the mail fraud conviction and on his connection to organized crime in the Chicago area. See http://gaming.nv.gov/loep_pascente.htm. According to Joe, Fred was employed at the club when he began there in 1995 and remained working at the club up until the middle of 1999. Fred is the person who originally introduced Joe to Mandera. Joe described Mandera as a family friend and testified that before taking the job at the club, he worked for Mandera's shipping company.

[3] Shortly after this case was argued in our court, Rizzolo pleaded guilty in the United States District Court for the District of Nevada to a felony charge of conspiring to defraud the United States of taxes in connection with operation of his Las Vegas The Crazy Horse Too club. See *United States of America v. Rizzolo*, No. 2:06-CR-188-PMP-PAL, Plea Memorandum (June 1, 2006). At the same time, The Power

(Continued on following page)

The club operated under the name The Crazy Horse Too until 2003. According to the briefs and records of the Illinois Secretary of State, the establishment now does business under the name "VIP's" or "VIP's, A Gentlemen's Club." Absent any indication from the parties to the contrary, we assume that its ownership and operations remain unchanged.

At the time the license revocation proceedings against Pooh Bah commenced and throughout the period relevant to this litigation, its club at 1531 North Kingsbury Street has provided something that other licensed establishments selling liquor by the drink in Chicago do not: seminude dancers. Entertainment venues featuring nude and seminude female dancers operate within the City's limits in compliance with municipal ordinances. None of them, however, has a liquor license. Throughout all of Chicago, Pooh Bah's club is the only commercial establishment where the sale of liquor by the drink and dancing by seminude women are combined.

Company, Inc., which is the parent company of the Las Vegas club, pleaded guilty to federal charges of "Conspiracy to Participate in an Enterprise Through a Pattern of Racketeering." See *United States of America v. The Power Company, Inc.*, No. 2:06-CR-186-PMP-PAL, Plea Memorandum (June 1, 2006). Proceedings in federal district court are a matter of which the courts of this state may take judicial notice. See, *e.g., Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 71 (1992). As part of the federal plea agreements, the club must be sold, and Rizzolo is barred from owning, operating, or having any involvement with any strip clubs or similar businesses involved in pornography or erotic entertainment or media in the United States and its territories for the remainder of his life.

The mix of alcohol sales and nude or seminude dancing was not always so rare. Roger G. O'Brien, a veteran Chicago police officer who has worked in the Department's 18th District vice unit since 1979, testified that the City's Rush Street entertainment district was once home to 12 or 13 strip clubs, all of which served alcohol. During that time, prostitution in and around the clubs was pervasive. According to O'Brien, in the late 1970s and mid-1980s, there were prostitutes on every corner in the Rush Street area, and inside the clubs, waitresses and dancers frequently solicited customers for sex. Antiprostitution campaigns waged by the City during the 1980s ultimately resulted in the closure of all these establishments. O'Brien estimated that when the strip clubs serving alcohol were shut down, the number of prostitution arrests in the area declined by 80%.

Pooh Bah's club is not located in Chicago's Rush Street entertainment area and is not related to any of the City's 1970- and 1980-era strip clubs. The type of entertainment presented at Pooh Bah's club would, however, probably be familiar to patrons of those now-defunct establishments. After paying an admission charge, $15 in the year 2000, customers of the club enter a room containing a bar, an elevated stage area, and tables and chairs.[4] Female performers take turns going on stage, where they

[4] As the club was configured when the last hearing in the case was held, a special "V.I.P." room was located in an elevated area adjacent to the main room. The "V.I.P." room afforded patrons an additional measure of privacy while still permitting them to view the rest of the club. Admission to the room required payment of an additional fee.

remove their clothing while dancing to prerecorded background music. For the most part, the performers called to testify in this case had not received any formal dance training. One described taking dance lessons when she was a child. Another indicated that while she had never been taught dance steps, she had "either choreographed or hired choreographers" to assist her in her performance.

Over the course of an evening, more than 20 women may perform on stage. During those performances, waitresses take drink orders from patrons and serve them at their tables. When an entertainer has finished on stage, she will circulate through the club and mingle with the customers. Her objective in doing this is twofold. First, she is expected to earn money for the club by encouraging patrons to buy premium-priced drinks for themselves and for her. Alcohol sales are a major source of the club's income, which is substantial. According to testimony given by Mandera in 2000, the club's gross annual revenue was $7 million. By comparison, strip clubs in Chicago that did not serve alcohol had annual revenues of only one or two million dollars.

A performer's second objective when circulating through the club is to earn money for herself through tips.[5]

---

[5] Performers were also occasionally tipped while performing on stage. When these proceedings began, tips were the sole source of compensation for most of the club's performers, who actually paid a fee to the club for the opportunity to perform there. The current compensation scheme, which involves a corporate intermediary as the women's nominal employer, appears to include some payments to the dancers in addition to sums earned as tips. The arrangement is a financially rewarding one for the performers. According to Mandera, the average dancer at the club was making "six figures a year" by the year 2000. Mandera reported his own take from the club to be $75,000 per month.

Dancers receive tips for providing two basic services: (1) sitting and talking with customers[6] and (2) doing table dances. A table dance is simply a brief striptease which a dancer performs for a customer at the customer's table. An additional fee is charged for this service. At Pooh Bah's club, the basic charge for a table dance is $20, but dancers reported receiving as much as $100.

The dances performed on stage and at customers' tables are intended to be erotic.[7] Performers typically move in a sexually suggestive fashion, often enhancing the effect by rubbing their breasts and pubic areas. Club policy specifies that dancers are to stay at least one foot away from customers during table dances, but evidence in the record suggests that this restriction is routinely ignored. The same is true of a club policy forbidding dancers to have physical contact with customers. The record shows that performers sometimes do deliberately touch customers during table dances. One report included earlobe nibbling. Dancer Tracey Lynn Sula admitted kissing customers on the cheek.

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[6] According to Crazy Horse Too performer Tyra M. Andrews, a/k/a "Rio," topics of conversation range from the weather to "someone's, you know, intricate sexual fantasies."

[7] The sexually stimulating effect of the performances is illustrated by an event at the club which took place on May 17, 2000, shortly before the final evidentiary hearing in the case. According to Mandera, police had to be summoned when a customer was moved to "expose [] his erect penis and was stroking it in full view of other patrons and the entertainers." Mandera, who was not physically present at the club when this episode took place, attributed it to the customer's injudicious use of the antidepressant medication Prozac. Alcohol was also implicated.

During both the onstage performances and the table dances, performers become largely, although not totally, nude. By the conclusion of a striptease, whether on stage or at a customer's table, the only item of clothing a dancer will still have on is a thong, sometimes referred to as a "T-bar." That garment consists of a narrow waistband to which is attached a panel of cloth intended to cover the woman's pubic area. A strip of material runs from the front panel, between the woman's legs, up through the cleft of her buttocks, then attaches to the waistband at the back. It is similar to a traditional G-string except that the cloth strip running between the woman's buttocks is wider. When a performer wears a thong, her anus is concealed. As with a G-string, however, her buttocks are left completely exposed.

Although performers at Pooh Bah's club remove all of their clothing but their thongs when they dance, they also apply flesh-toned makeup and latex to their nipples and areolas. The makeup and latex do not conceal the contours of the nipple area. They merely obscure the naturally darker color of that portion of the women's breasts. Evidence was presented that the dancers are also required by club policy and practice to extend the makeup and latex covering to a triangular area extending below the areola in the area in the frontal portion of the breast. Whether any female performers at Pooh Bah's club ever actually did that is open to question. It is clear, however, that the entire sides of the dancers' breasts remained fully exposed with no latex or makeup coating. From photographs and video exhibits contained in the record, the dancers' breasts appear nude. But for the change in color of the nipples and areolas, one could not tell that the dancers' breasts had been covered in any way. Testimony from investigating

police officers indicated that, in person, one could sometimes see through the makeup and latex and discern the difference in coloration between a dancer's areolas and the fleshy portion of her breasts.

While the name of Pooh Bah's club has changed over the years, the way dancers have appeared when interacting with customers has remained constant. The combination of "T-bars" and latex-covered nipples and areolas has been a hallmark of the club since it first adopted the "gentlemen's club" format in 1993. As we have previously indicated, and as we shall discuss again later, Chicago municipal ordinances do not prohibit women from dancing for customers in that state of undress. Throughout the period at issue here, clubs have been permitted to operate in the City featuring dancers who wear even less. Indeed, there are establishments where dancers perform in a state of complete nudity. What triggered this litigation is Pooh Bah's decision to present dancers in "T-bars" and latex makeup while continuing to serve alcoholic beverages to its patrons.

Pooh Bah's combination of nude or seminude dancing and liquor sales was opposed by municipal authorities as soon as the club attempted it. Pooh Bah introduced seminude dancing in February of 1993. City police were on the premises conducting investigations within two weeks. By the following month, the Liquor Control Commission of the City of Chicago had initiated administrative proceedings against Pooh Bah to revoke various municipal licenses which had been issued to the company, including its municipal retail liquor license. The basis for the revocation, as indicated at the outset of this opinion, was that the company, by and through its agents, had violated section 4-60-140(d) of the Chicago Municipal Code, which

prohibits establishments licensed to serve alcoholic beverages from permitting any employee, entertainer or patron to engage in "any live act, demonstration, dance or exhibition * * * which exposes to public view * * * [h]is or her genitals, pubic hair, buttocks * * * or [a]ny portion of the female breast at or below the areola thereof." For purposes of the ordinance, the foregoing body parts are considered to be exposed to public view if they are "uncovered or [are] less than completely and opaquely covered." Chicago Municipal Code §4-60-140(d) (2006).

Pooh Bah attempted to block the license revocation by filing a suit for declaratory and injunctive relief in the circuit court of Cook County. The circuit court denied Pooh Bah's request for a temporary restraining order. The Local Liquor Commissioner of the City of Chicago subsequently entered an order, following the requisite notice and a hearing, which revoked the City of Chicago retail liquor license and all other city licenses issued to Pooh Bah for its strip club at 1531 North Kingsbury Street based on its determination that the company had, in fact, violated section 4-50-140(d) of the Municipal Code.

Pooh Bah appealed the revocation of its liquor licence [sic] to the City of Chicago's liquor appeal commission pursuant to sections 7-5 and 7-9 of the Liquor Control Act of 1934 (235 ILCS 5/7-5, 7-9 (West 1996)). The Commission affirmed. Pooh Bah petitioned for rehearing. 235 ILCS 5/7-10 (West 1996). When that petition was denied, Pooh Bah sought judicial review in the circuit court of Cook County pursuant to this state's Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 1996)). See 235 ILCS 5/7-9, 7-11 (West 1996). The request for judicial review was asserted by Pooh Bah by means of a new count added to an amended complaint it filed in connection with its civil

action for declaratory and injunctive relief, which remained pending.[8]

Revocation of Pooh Bah's municipal licenses was stayed while judicial review of the revocation decision was underway and Pooh Bah's civil action continued. The City, however, did not wait for those matters to be resolved before taking further action. It filed a counterclaim against Pooh Bah for equitable and other relief. The basis for its counterclaim was that the strip club operated by the company at 1531 North Kingsbury Street violated section 8-4-090(a) of the Chicago Municipal Code. Under that statute,

> "[a]ny premises used for prostitution, illegal gambling, illegal [drug] trafficking * * * or any other activity that constitutes a felony, misdemeanor, business offense or petty offense under federal, state or municipal law is hereby declared to be a public nuisance * * * ." Chicago Municipal Code §8-4-090(a) (2005).

In the City's view, Pooh Bah was committing a business or petty offense within the meaning of this statute by allowing its entertainers to engage in live acts, demonstrations, dances or exhibitions which expose to public view portions of the buttocks and female breasts at or below the areola in violation of section 4-60-140(d) of the Municipal Code.

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[8] Pooh Bah also sought review of the revocation of its other municipal licenses. With respect to those revocations, it proceeded by means of a petition for a common law writ of *certiorari*, which it included as an additional new count in its amended complaint. The propriety of the procedures employed by Pooh Bah for securing administrative review has not been challenged and is not at issue in this appeal.

The foregoing proceedings, which we shall designate as the license revocation case, were protracted. Because the license revocations had been stayed pending review, however, Pooh Bah's municipal licenses remained in effect and the company was able to continue operating its strip club at 1531 North Kingsbury Street throughout the remainder of the 1990s. In 1999, further investigation by undercover police officers revealed that dancers at the club continued to engage in the type of conduct which had triggered the initial license revocation proceedings six years earlier. The City therefore filed a new action in the circuit court of Cook County to obtain injunctive relief to shut down the club.

The basis for the City's new claim was essentially the same as that asserted in connection with the original license revocation case. According to the City, Pooh Bah had violated and continues to violate section 4-60-140(d) of the Municipal Code of Chicago by "causing, encouraging or permitting" female performers at the club to engage in dances or exhibitions "which expose to public view portions of the female breast at or below the areola, the buttocks, the pubic hair regions and portions of the genitalia." The City further alleged that Pooh Bah was in violation of section 8-4-090(a) of the Chicago Municipal Code, the city's public nuisance ordinance. Unlike the City's counterclaim in Pooh Bah's civil action challenging the license revocation, the City's public nuisance claim in this case not only charged violation of the liquor ordinance, it asserted that Pooh Bah had caused, encouraged and permitted female performers to engage in prostitution and to solicit for prostitution.

After filing its new complaint for injunctive relief, the City moved for issuance of a preliminary injunction.

Following discovery and a series of hearings extending over several months, the circuit court ruled in January of 2001 that section 4-60-140(d) of the Municipal Code of Chicago contravened the first and fourteenth amendments to the United States Constitution (U.S. Const., amends. I, XIV) and article I, section 4, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §4) and therefore could not serve as the predicate for the City's claim that Pooh Bah's strip club was being operated in a manner that constitutes a public nuisance. Concluding that the City had failed to establish that operation of the strip club created a public nuisance in any other way, the circuit court denied the City's motion for a preliminary injunction.

By agreement of the parties, the circuit court amended its ruling, *nunc pro tunc,* on May 3, 2001, to clarify certain of its provisions. In a separate order entered the same day, the circuit court also granted a joint motion by the parties to consolidate the license revocation case with the public nuisance case and to adopt the evidentiary record developed in connection with the motion for a preliminary injunction as the basis for resolution of the license revocation and public nuisance cases on the merits.[9] In yet a third order dated May 3, 2001, the court entered judgment in favor of Pooh Bah and against the City on the City's public nuisance claims; reversed the decision of the liquor appeal commission upholding revocation of Pooh Bah's municipal licenses; vacated the revocation of those licenses; reserved for future consideration various related and subsidiary issues; and made an

[9] The agreed order reserved to the City the right to present additional evidence regarding the amount of fines that could be imposed on Pooh Bah in the event the City prevailed on the merits.

express written finding that there was no just reason for delaying enforcement or appeal.

The City took an interlocutory appeal from the circuit court's judgement.[10] Rejecting the circuit court's position, the appellate court held that section 4-60-140(d) of the Municipal Code of Chicago does not violate either the federal or the Illinois Constitution. Because the ordinance is not unconstitutional, the appellate court further held that violation of the ordinance could serve as the basis for (1) revoking Pooh Bah's municipal licenses and (2) finding that Pooh Bah's operation of the strip club constituted a public nuisance. The appellate court therefore reversed the circuit court's judgment and remanded for further proceedings with respect to both the license revocation case and the City's public nuisance claim. Nos. 1-01-0592, 1-01-1932 cons. (unpublished order under Supreme Court Rule 23). After failing to persuade the appellate court to grant rehearing, Pooh Bah petitioned our court for leave to appeal. 177 Ill. 2d R. 315.[11] We granted that petition, and the cause is now before us for review.

In resolving this appeal, the pivotal inquiry is whether section 4-60-140(d) of the Municipal Code of Chicago violates either the United States or the Illinois Constitution. When assessing the validity of municipal

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[10] Although the procedural basis for the appeal was not specified, interlocutory review was permissible under Supreme Court Rules 304(a) (155 Ill. 2d R. 304(a)) and 307(a)(1) (188 Ill. 2d R. 307(a)(1)).

[11] Perry Mandera, who, through ACE Enterprises is now the sole owner of Pooh Bah, was a party to the proceedings in the lower courts and joined in Pooh Bah's petition for leave to appeal to our court. For purposes of this appeal, his position is identical to Pooh Bah's, and reference to Pooh Bah in the discussion which follows should be understood to include him.

ordinances, our analysis is guided by the same standards applicable to statutes. *City of Chicago v. Morales,* 177 Ill. 2d 440, 447 (1997). As with statutes, municipal ordinances are presumed to be valid. *Chavda v. Wolak,* 188 Ill. 2d 394, 398 (1999). The burden of rebutting that presumption is on the party challenging the law's validity. *La Salle National Bank v. Evanston,* 57 Ill.2d 415, 428 (1974). Courts are obligated to uphold the constitutionality of ordinances whenever it is reasonably possible to do so. *City of Chicago v. Alton R.R. Co.,* 355 Ill. 65, 75 (1933). Whether a legislative enactment is constitutional presents a question of law which we review *de novo.* See *O'Brien v. White,* 219 Ill. 2d 86, 98 (2006).

We consider first Pooh Bah's contention that section 4-60-140(d) of the Municipal Code of Chicago violates the first amendment to the United States Constitution. The first amendment is binding on the states through the fourteenth amendment's due process clause. *People v. Alexander,* 204 Ill.2d 472, 476 (2003). It provides, in part, that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const., amend. I.

Although the first amendment literally forbids only the abridgement of freedom of speech, the United States Supreme Court has long recognized that its protections are not limited to the written or spoken word. They may also extend to expressive conduct. *Texas v. Johnson,* 491 U.S. 397, 404, 105 L. Ed. 2d 342, 353, 109 S. Ct. 2533, 2539 (1989). Generally speaking, the first amendment prevents the government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. Nevertheless, restrictions upon the content of speech have traditionally been permitted in a few limited

areas which are "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383, 120 L. Ed. 2d 305, 317, 112 S. Ct. 2538, 2543 (1992), quoting *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 86 L. Ed. 1031, 1035, 62 S. Ct. 766, 769 (1942). Under the first amendment jurisprudence developed by the United States Supreme Court, freedom of speech does not include freedom to ignore these traditional limitations. *R.A.V. v. City of St. Paul,* 505 U.S. at 383, 120 L. Ed. 2d at 317, 112 S. Ct. at 2543.

The municipal ordinance challenged in this case pertains to live acts, demonstrations, dances or exhibitions which expose to public view the performer's genitals, pubic hair, buttocks or, in the case of female performers, any portion of the breast at or below the areola. The ordinance does not bar all such performances, only those that take place at establishments licensed to serve alcohol. At the time the license revocations were initiated in this case, the United States Supreme Court adhered to the view that where, as here, the sale of alcohol is involved, the regulatory authority conferred on states by the twenty-first amendment to the United States Constitution (U.S. Const., amend. XXI) gave states and their political subdivisions the power to ban nude dancing. Under the Court's analysis, the broad powers of the states to regulate the sale of liquor pursuant to the twenty-first amendment outweighed any first amendment interest in nude dancing. The state therefore had the authority to ban nude dancing as a part of its liquor licensing program. *City of Newport v. Iacobucci,* 479 U.S. 92, 95, 93 L. Ed. 2d 334, 339, 107 S. Ct. 383, 385 (1986), quoting *California v. LaRue,* 409 U.S. 109,

114, 34 L. Ed. 2d 342, 349-50, 93 S. Ct. 390, 395 (1972). As the Court noted in *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718, 69 L. Ed. 2d 357, 361, 101 S. Ct. 2599, 2602 (1981):

> "Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts."

See also *California v. LaRue,* 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972) (given broad sweep of twenty-first amendment, regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink not facially invalid).

Under the foregoing authority, section 4-60-140(d) of the Municipal Code of Chicago, which prohibits nude entertainment in establishments licensed to sell alcohol by the drink, would clearly not be subject to challenge on first amendment grounds. During the pendency of this litigation, however, the United States Supreme Court altered its view of the interplay between the first and twenty-first amendments. In *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 516, 134 L. Ed. 2d 711, 736, 116 S. Ct. 1495, 1514 (1996), the Court held that while the twenty-first amendment

> "limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its

> borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.' [Citation.]"

Noting its specific holdings in prior cases that "the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause [citations]; the Establishment Clause [citation] or the Equal Protection Clause [citation]," the Court concluded that the same should also be true with respect to the free speech clause. *44 Liquormart,* 517 U.S. at 516, 134 L. Ed. 2d at 736, 116 S. Ct. at 1514-15. It therefore held "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *44 Liquormart,* 517 U.S. at 516, 134 L. Ed. 2d at 736, 116 S. Ct. at 1515.

Although the Court thus disavowed the reasoning employed in *City of Newport v. Iacobucci, New York State Liquor Authority v. Bellanca,* and *California v. LaRue,* insofar as it relied on the twenty-first amendment, it distinguished cases such as *LaRue,* which involved the regulation of nude dancing in places where alcohol was served. The Court held that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart,* 517 U.S. at 515, 134 L. Ed. 2d at 735, 116 S. Ct. at 1514. One of those locations is an establishment where nude dancing is allowed. Accordingly, the Court held that its "analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment." *44 Liquormart,* 517 U.S. at 515, 134 L. Ed. 2d at 735, 116 S. Ct. at 1514.

Four years after *44 Liquormart* was decided, the United States Supreme Court examined the validity of a

municipal public indecency ordinance which made it an offense to intentionally appear in public in a "state of nudity." Under that ordinance, whose provisions were similar to those at issue in this case, "nudity" was defined to include the "showing of the * * * buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; * * * or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 n.*, 146 L. Ed. 2d 265, 274 n.*, 120 S. Ct. 1382, 1388 n.* (2000). Unlike the matter before us today, these prohibitions were not limited to establishments licensed to serve alcohol.

Pap's, a Pennsylvania corporation which operated Kandyland, an establishment featuring totally nude erotic dancing by women, challenged the ordinance on the grounds that its public nudity provisions violated the first and fourteenth amendments to the United States Constitution. Although the Pennsylvania Supreme Court upheld the corporation's challenge (*Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A.2d 273 (1998)), the United States Supreme Court reversed and remanded. In a plurality opinion authored by Justice O'Connor, the Court held that while erotic nude dancing is expressive conduct, it falls "only within the outer ambit of the First Amendment's protection." *Pap's A.M.*, 529 U.S. at 289, 146 L. Ed. 2d at 278, 120 S. Ct. at 1391. Concluding that the ordinance was directed at combating negative secondary effects associated with adult establishments and was unrelated to the suppression of the erotic message conveyed by nude dancing, the Court held that it was not subject to strict

scrutiny. Rather, its validity turned on whether it passed the less stringent intermediate standard set forth in *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). *Pap's A.M.,* 529 U.S. at 296, 146 L. Ed. 2d at 282, 120 S. Ct. at 1394-95.

Under *O'Brien,* a content-neutral regulation will be upheld if it (1) is within the constitutional power of the government, (2) furthers an important or substantial governmental interest, (3) is unrelated to the suppression of free expression, and (4) restricts first amendment freedoms no further than is essential to further the government's interest. *O'Brien,* 391 U.S. at 377, 20 L. Ed. 2d at 680, 88 S. Ct. at 1679 (1968). The Court in *Pap's A.M.* held that the nude-dancing ordinance at issue in that case was justified under these standards. According to the court, the municipality's efforts to protect public health and safety were clearly within its police powers. The ordinance furthered the city's undeniably important interest in combating the harmful secondary effects associated with nude dancing. *Pap's A.M.,* 529 U.S. at 296-97, 146 L. Ed. 2d at 282-83, 120 S. Ct. at 1395. It was unrelated to the suppression of free expression, and "any incidental impact on the expressive element of nude dancing [was] *de minimus,*" leaving "ample capacity to convey the dancer's erotic message." *Pap's A.M.,* 529 U.S. at 301, 146 L. Ed. 2d at 286, 120 S. Ct. at 1397.

As we have indicated, the public indecency ordinance at issue in *Pap's A.M.* was general in nature. Unlike section 4-60-140(d) of the Municipal Code of Chicago, its restrictions were not limited to establishments licensed to sell alcoholic beverages. In the years following *44 Liquormart* and *Pap's A.M.,* the United States Supreme Court itself has not specifically addressed the framework which

should be followed in analyzing first amendment challenges to adult entertainment restrictions contained in municipal liquor regulations. The issue was, however, recently addressed by the United States Court of Appeals for the Seventh Circuit in *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702 (7th Cir. 2003).

Ben's Bar concerned an ordinance enacted by the Village of Somerset, Wisconsin that, in part, prohibited the sale, use or consumption of alcohol on the premises of "sexually oriented businesses." Under the village's regulatory scheme, an establishment fell within the definition of "sexually oriented business," and therefore could not serve alcohol, if it featured nude or seminude dancers. For purposes of the ordinance, nudity was defined as "the appearance of the human bare anus, anal cleft or cleavage, pubic area, male genitals, female genitals, or the nipple or areola of the female breast, with less than a fully opaque covering; or showing of the covered male genitals in a discernibly turgid state." *Ben's Bar,* 316 F.3d at 706 n.5. Seminudity was "the exposure of a bare male or female buttocks or the female breast below a horizontal line across the top of the areola at its highest point with less than a complete and opaque covering." *Ben's Bar,* 316 F.3d at 708.

The village's reasons for enacting this ordinance were expressly noted in the "legislative findings" section of the ordinance itself. That section stated:

> "Based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community in reports made available to the Village Board, and on the holdings and findings in [numerous Supreme Court, federal appellate, and state appellate judicial

decisions], as well as studies and summaries of studies conducted in other cities . . . and findings reported in the Regulation of Adult Entertainment Establishments in St. Croix County, Wisconsin; and the Report of the Attorney General's Working Group of Sexually Oriented Businesses . . . the Village Board finds that:

(a) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.

(b) Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.

(c) Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.

(d) There is an increase in the potential for infiltration by organized crime for the purpose of unlawful conduct.

(e) The consumption of alcoholic beverages on the premises of a Sexually Oriented Business exacerbates the deleterious secondary effects of such businesses on the community." (Emphasis omitted.) *Ben's Bar,* 316 F.3d at 705.

Following enactment of this ordinance, but two months before it was to take effect, a bar that provided nude and seminude dancing and that held a liquor license issued by the village, along with two of the bar's dancers, filed an action against the village asserting, *inter alia,* that the ordinance violated their rights to free expression

under the first amendment. *Ben's Bar,* 316 F.3d at 705. The trial court rejected that claim and granted summary judgment in favor of the village. The bar appealed, arguing that the trial court erred in concluding that the ordinance did not constitute an unconstitutional restriction on nude dancing. *Ben's Bar,* 316 F.3d at 707.

In undertaking its review of the trial court's judgment, the court of appeals began by dismissing as fallacious the bar's contention that the ordinance was directed at the dancer's attire, or lack thereof. The ordinance, the court held, "restricts the sale and consumption of alcoholic beverages in establishments that serve as venues for adult entertainment, not the attire of nude dancers." *Ben's Bar,* 316 F.3d at 708. The court then proceeded to review recent United States Supreme Court authority governing adult entertainment regulations, including *44 Liquormart* and *Pap's A.M.* and its adoption of *O'Brien*'s four-part test. The court also discussed *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002). That decision, which followed *Pap's A.M.,* upheld, at the summary judgment stage, an ordinance prohibiting multiple adult entertainment businesses from operating in the same building. The primary issue in the case was the appropriate standard for determining whether the ordinance served a substantial governmental interest. No majority could be reached on that question, but Justice Kennedy concurred in the plurality's overall conclusion that a municipality's initial burden of demonstrating a substantial government interest in regulating the adverse secondary effects associated with adult entertainment is slight. *Ben's Bar,* 316 F.3d at 722. "As to this," he observed,

> "we have consistently held that a city must have latitude to experiment, at least at the outset, and

> that very little evidence is required. [Citations.] As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. [Citation.] The Los Angeles City Council knows the streets of Los Angeles better than we do. [Citations.] It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion." *Alameda Books,* 535 U.S. at 451-52, 152 L. Ed. 2d at 691, 122 S. Ct. at 1742-43.

Based on its review of the authorities set forth above and others, the Seventh Circuit concluded that under controlling United States Supreme Court precedent, a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if:

> "(1) the State is regulating pursuant to a legitimate governmental power [citation]; (2) the regulation does not completely prohibit adult entertainment [citation]; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments [citation]; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available [citation]; *or,* alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. [Citation.]" (Emphasis in original.) *Ben's Bar,* 316 F.3d at 722.

Step four of this test encapsulates the so-called intermediate standard of scrutiny. *Joelner v. Village of Washington Park,* 378 F.3d 613, 622 (7th Cir. 2004).[12]

Applying the foregoing analytical framework to the Somerset village ordinance, the Seventh Circuit held that the village's regulation of alcohol sales and consumption in inappropriate locations was clearly within its general police powers. The ordinance was therefore of the type which the government has the constitutional authority to enact. *Ben's Bar,* 316 F.3d at 722, citing *Pap's A.M.,* 529 U.S. at 296, 146 L. Ed. 2d at 282-83, 120 S. Ct. at 1395. Next, the court concluded that the ordinance did not completely bar Ben's Bar employees from conveying an erotic message. In the court's view, it merely prohibited alcohol from being sold or consumed on the premises of adult entertainment establishments. *Ben's Bar,* 316 F.3d at 723. With respect to step three, the court determined, after reviewing the record, that the predominant concern of the village in adopting the ordinance was the negative secondary effects attendant to sexually oriented businesses, such as increased crime and reduced property values in neighboring business and residential areas. The village was not attempting to suppress any speech or conduct protected by the first amendment. *Ben's Bar,* 316 F.3d at 723-24.

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[12] If a regulation fails to satisfy either step two or step three, a more rigorous standard will apply. The regulation will have to withstand strict scrutiny in order to pass constitutional muster. *Joelner v. Village of Washington Park,* 378 F.3d at 622-23. Pooh Bah argues that the strict scrutiny standard should govern this case. For the reasons set forth later in this opinion, Pooh Bah is incorrect.

Because the Village's ordinance thus satisfied these preliminary standards, the court proceeded to the fourth and final step. In applying that step, the court explained that it was required to determine whether the village had adequately demonstrated that there was a connection between the speech regulated by the ordinance and the secondary effects that motivated the ordinance's adoption. As we have previously detailed, the record showed that the village relied on numerous judicial decisions, studies from 11 different cities, "findings reported in the Regulation of Adult Entertainment Establishments of St. Croix, Wisconsin," and the Report of the Attorney General's Working Group of Sexually Oriented Businesses (State of Minnesota, June 6, 1989) to support its conclusion that adult entertainment produces adverse secondary effects. *Ben's Bar,* 316 F.3d at 725. The court opined that this evidentiary record "fairly support[ed] the Village's proffered rationale for [the ordinance], and that [the bar had] failed 'to cast direct doubt on this rationale.'" *Ben's Bar,* 316 F.3d at 726, quoting *Alameda Books,* 535 U.S. at 438, 152 L. Ed. 2d at 683, 122 S. Ct. at 1736.

In finding the village's evidentiary showing to be sufficient, the Seventh Circuit rejected a claim by the bar that the village should have been required to conduct its own studies, at the local level, to determine whether adverse secondary effects result when liquor is served on the premises of adult entertainment establishments. Citing various decisions by the United States Supreme Court, the court held that a municipality is not required to conduct new studies or produce evidence independent of that already generated by other cities "'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city

addresses.' [Citation.]" *Ben's Bar,* 316 F.3d at 725. The Seventh Circuit also rejected the bar's argument that the village's case was fatally deficient because it had not adduced any written reports relating specifically to the effects of serving alcohol in establishments offering nude and seminude dancing. Again citing precedent from the United States Supreme Court, it held that it was entirely reasonable for the village to conclude that barroom nude dancing was likely to produce adverse secondary effects at the local level even in the absence of specific studies on the matter. As the New York state legislature noted in connection with the legislation challenged in *Bellanca,* "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." N.Y. State Legis. Ann. 150 (1977), quoted in *Bellanca,* 452 U.S. at 718, 69 L. Ed. 2d at 361, 101 S. Ct. at 2601. See also *Ben's Bar,* 316 F.3d at 726.

Turning next to the question of whether the village's ordinance was narrowly tailored, the court reiterated that the ordinance did not, in fact, impose any restrictions at all on a dancer's ability to convey an erotic message. Rather, it merely prohibited sexually oriented businesses from serving alcohol to customers while nude or seminude dancing is going on. That, the court explained, is not a restriction on erotic expression, but a prohibition of nonexpressive conduct (serving and consuming alcohol) during the presentation of expressive conduct. In the court's view, the first amendment does not entitle a bar, its dancers or its patrons to have alcohol available while nude or seminude dancing is taking place. *Ben's Bar,* 316 F.3d at 726. The court cited numerous authorities from other jurisdictions to the same effect. See, *e.g., Department of Alcoholic Beverage Control v. Alcoholic Beverage Control*

Appeals Board, 99 Cal. App. 4th 880, 895, 121 Cal. Rptr. 2d 729, 741 (2002) ("The state * * * has not prohibited dancers from performing with the utmost level of erotic expression. They are simply forbidden to do so in establishments that serve alcohol, and the Constitution is not thereby offended").

The court next observed that the village's ordinance was limited to adult entertainment establishments and was inapplicable to theaters, performing art centers and other venues where performances of serious artistic merit are regularly offered. *Ben's Bar,* 316 F.3d at 727. Finally, it noted that the ordinance's prohibition was no greater than was essential to furtherance of the village's substantial interest in combating the secondary effects resulting from the combination of nude or seminude dancing and alcohol consumption. That was so, in the court's view, "because, as a practical matter, a complete ban of alcohol on the premises of adult entertainment establishments is the *only* way the Village can advance that interest." (Emphasis in original.) *Ben's Bar,* 316 F.3d at 727.[13]

In light of the foregoing, the court concluded that the Village's ordinance did not violate the first amendment. Wrote the court:

> "The regulation has no impact whatsoever on the tavern's ability to offer nude or semi-nude

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[13] Because it believed that alcohol prohibition was, as a practical matter, the least restrictive means of furthering the village's interest in combating the negative secondary effects resulting from the combination of adult entertainment and alcohol consumption, the court did not undertake a specific analysis of the alternative standard set forth in step four of its four-part test. None was necessary, as the result would be the same. *Ben's Bar,* 316 F.3d at 725 n.31.

> dancing to its patrons; it seeks to regulate alcohol and nude or semi-nude dancing without prohibiting either. The citizens of the Village of Somerset may still buy a drink and watch nude or semi-nude dancing. They are not, however, constitutionally entitled to do both at the same time and in the same place. *Gary*, 311 F.3d at 1338 (holding that there is no generalized right to associate with other adults in alcohol-purveying establishments with other adults). The deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message. Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated (not necessarily from the reduction in ogling and cat calls, but certainly from any decrease in the amount of tips she might otherwise receive). And we do not doubt Ben's Bar's assertion that its profit margin will suffer if it is unable to serve alcohol to its patrons. But the First Amendment rights of each are not offended when the show goes on without liquor." *Ben's Bar,* 316 F.3d at 728.

The analysis employed by the court in *Ben's Bar,* 316 F.3d 702, was subsequently followed by the Seventh Circuit in *Joelner v. Village of Washington Park,* 378 F.3d 613 (7th Cir. 2004). While decisions of the Seventh Circuit are not binding on this tribunal (*Bowman v. American River Transportation Co.,* 217 Ill. 2d 75, 91 (2005)), its decision in *Ben's Bar* was recently adopted by the United States Court of Appeals for the Third Circuit in *181 South, Inc. v. Fischer,* 454 F.3d 228 (3d Cir. 2006), and we believe that it constitutes persuasive authority on the issues presented by this case. We therefore elect to follow it.

Under the four-part test articulated in *Ben's Bar,* section 4-60-140(d) of the Municipal Code of Chicago, the ordinance at issue in this case, does not offend the first amendment to the United States Constitution. First, as with the Somerset village ordinance at issue in *Ben's Bar,* section 4-60-140(d) of Chicago's Municipal Code was directed toward the regulation of alcohol sales and consumption in inappropriate locations, a matter within the City's general police powers. See *BZAPS, Inc. v. City of Mankato,* 268 F.3d 603, 608 (8th Cir. 2001) (city is entitled under its police power to prohibit the sale of alcohol in a location that features adult entertainment). Second, the ordinance does not completely prohibit nude or seminude dancing. It merely prohibits such performances at establishments licenced [sic] to sell alcohol. Where alcohol is not sold or served, nude and seminude dancing is not prohibited by the City of Chicago. Venues providing nude or seminude dancing have operated and continue to operate in the City in accordance with state law and local ordinances.

We next consider the third step of *Ben's Bar,* which specifies that the challenged regulation must be aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments. Resolution of this issue turns on the predominate concerns motivating the law's enactment. *Ben's Bar,* 316 F.3d at 723; see *Joelner,* 378 F.3d at 624; *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402, 407-08 (7th Cir. 2004); *G.M. Enterprises v. Town of St. Joseph,* 350 F.3d 631, 637 (7th Cir. 2003). In evaluating a municipality's regulatory motivations, we are free to take into account a wide variety of materials, including, but not limited to, the text of the regulation or ordinance, any

preamble or express legislative findings associated with it, and studies and information of which legislators were clearly aware. See *Joelner,* 378 F.3d at 624. The inquiry at this stage of the analysis is highly deferential to the legislative body that enacted the ordinance. See *XLP Corp. v. County of Lake,* 359 Ill. App. 3d 239, 246 (2005).

Just as the Somerset village board made legislative findings in support of the ordinance upheld by the Seventh Circuit in *Ben's Bar,* the Chicago city council detailed its concerns in enacting the ordinance at issue in this case. The ordinance was part of a package of ordinances and ordinance amendments adopted in 1993 to establish "adult uses" within various zoning districts in the City. In the preamble to those amendments, the Chicago city council explained:

> "Experience in the City of Chicago as well as in other cities has shown that adult uses in certain areas of a city may lead to increased levels of criminal activity, including but not limited to prostitution and assault; and
>
> Merchants in some commercial areas of the City justifiably are concerned that the location of adult use establishments in such areas will have a serious negative effect; and
>
> In fact, the experiences of Seattle, Washington, and Detroit, Michigan, among other cities, have demonstrated that adult use establishments may degrade the quality of the area in which they are located and may have a blighting effect on a city; and
>
> Adult uses which continued to operate as nonconforming uses have had a deleterious effect

on surrounding neighborhoods to a much greater extent than many other uses; and

* * *

The reasonable regulation of adult uses will provide for the protection of property values and will protect City residents and persons who work within the City from the adverse effects of adult uses, while providing those who desire to patronize adult use establishments a reasonable cpportunity to do so in areas of the establishments; and

Adult uses should be treated as special uses to enable individualized consideration of the effects of an adult use on the surrounding neighborhood * * * ."

There is nothing in the record to suggest that these objectives were pretextual. Thomas Smith, assistant commissioner for zoning for the City of Chicago's department of planning and development, was personally involved in the formulation of the City's adult use ordinances and he testified in these proceedings. Echoing many of the circumstances reported by Officer O'Brien during his testimony, Smith explained the negative secondary effects adult businesses had caused in the City in the past, particularly in the Old Town, Rush Street and South Loop areas. Smith recounted a variety of criminal activities that were associated with strip clubs and cabarets where liquor was served and "B girls" plied their trade. Conventioneers were bilked of their money. Prostitution was rampant. Illegal earnings were collected by club proprietors and not reported to taxing authorities.

In researching how best to deal with the negative secondary effects of strip clubs and other adult entertainment establishments, Smith's department consulted groups such as the American Planning Association and the National Institute of Municipal Law Officers. It also obtained and reviewed numerous studies conducted in other major metropolitan areas in addition to those specifically noted by the city council. Most were prepared by city planning departments in connection with local police departments. Among them were reports from the cities of Phoenix, Indianapolis, Minneapolis, St. Paul, and Los Angeles. Some, including the Minneapolis and St. Paul studies, took into account the specific relationship between the combination of alcohol sales and adult uses on the incidence of neighborhood crime. According to Smith's testimony, the studies were consistent in showing that the presence of adult entertainment establishments, including strip clubs which served liquor, led to higher crime rates.

While we do not know whether the additional studies discussed by Smith were expressly presented to the city council before it enacted the legislative package which included section 4-60-140(d) of the Municipal Code, those studies did inform the recommendations Smith made to the city council, and the concerns he expressed were, in turn, reflected in the legislative preamble adopted by the city council. When one considers the preamble, the text of the ordinance, the historical context in which the 1993 version of the law was enacted, and the undisputed fact that fully nude dancing is permitted by the City in establishments that do not serve alcohol, the notion that section 4-60-140(d) of the Municipal Code represents an effort by the City to restrict certain viewpoints or modes of expression is completely untenable. See *G.M. Enterprises,* 350 F.3d at 638.

In *R.V.S., L.L.C.,* 361 F.3d at 409-10, the court found that the predominate concerns motivating Rockford to enact a municipal ordinance regulating "exotic dancing nightclubs" related "to combating prostitution, crime and other negative externalities" notwithstanding the fact that the record included testimony by one of the city's aldermen, in response to questions regarding the purpose of the ordinance, that "there were some concerns that some people just don't like this type of entertainment." The Seventh Circuit correctly declined to give that testimony dispositive effect, noting, among other things, that "what motivates one legislator to support a statute is not necessarily what motivates others to enact it. [Citations.]" *R.V.S., L.L.C.,* 361 F.3d at 410. The City's position in this case is unencumbered by even that level of uncertainty. In contrast to *R.V.S., L.L.C.,* there is nothing at all in this case to suggest, directly or indirectly, that the City harbored any hostility of any kind toward the expressive conduct in which the dancers at Pooh Bah's club were engaged. Based on the record before us here, combating the negative secondary effects caused by adult entertainment establishments was not only the predominate motive for the City's actions, it was the only motivation.

In an attempt to refute this conclusion, Pooh Bah argues that the language used in a prior version of section 4-60-140(d) of the Municipal Code can be read as evincing an intention by the city council to reach the content of expression rather than its secondary effects. That contention is untenable for three reasons. First, unlike the preamble applicable to the current version of the law, the language invoked by Pooh Bah, which states that the ordinance "controls the form of entertainment in places licensed to sell alcoholic beverages" is not part of the

ordinance itself. It is merely a generic description of the legislation included by the committee on police, fire, personnel, schools and municipal institution in its recommendation to the city council that the ordinance be approved. Second, even if the committee's views could be imputed to the city council and even if the language it employed could be read as actually referring to the content of conduct that is protected, reference to content is not the same as suppression of content. *Sammy's of Mobile Ltd. v. City of Mobile,* 140 F.3d 993, 998 (11th Cir. 1998). Like the present law, the version of the ordinance invoked by Pooh Bah does not impose any limitations on nude or seminude dancing. Its effect is simply to ban alcohol sales where such dancing takes place. Finally, and perhaps most basically, the prior version of the law is not at issue here. It is the subsequent 1993 version of the ordinance that gave rise to these proceedings, and the preamble adopted in connection with that ordinance is what reflects the city council's motivation in adopting that version of the law.

Because section 4-60-140(d) of the Chicago Municipal Code thus satisfies steps two and three of the test set forth in *Ben's Bar,* we proceed to step four, namely, whether the ordinance is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available *or,* alternatively, the ordinance furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. *Ben's Bar,* 316 F.3d at 722. As previously discussed, this inquiry encapsulates the intermediate standard of review applicable to first amendment challenges to adult entertainment regulations. Under *Ben's Bar* and the precedent on which it is based, assessing

whether an ordinance serves a substantial government interest under this standard requires a court to determine whether the municipality has adequately demonstrated that a connection exists between the speech regulated by the ordinance and the secondary effects the ordinance was designed to address. *Ben's Bar,* 316 F.3d at 724. In making this determination, the appropriate focus is not the actual intent of the governmental body. The government's actual intent relates to the earlier inquiry regarding the predominant motivation behind its decision to enact the law. The question at this stage is whether the government can show that the regulation serves a current governmental interest. See *Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 515 (4th Cir. 2002). The harms to which the law is addressed must be real, not merely conjectural, and the law must alleviate those harms in a direct and material way. See *Giovani Carandola, Ltd.,* 303 F.3d at 515, quoting *Satellite Broadcasting & Communications Ass'n v. FCC,* 275 F.3d 337, 356 (4th Cir. 2001).

The current governmental interest advanced by the City in support of section 4-60-140(d) of its Municipal Code is the avoidance of the negative secondary effects which result from the sale and consumption of alcohol at adult entertainment establishments. That "[l]iquor and sex are an explosive combination" (*Blue Canary Corp. v. City of Milwaukee,* 251 F.3d 1121, 1124 (7th Cir. 2001)) is a proposition so frequently confirmed by human experience that it can scarcely be questioned. Nude and topless dancing in bars has "a long history of spawning deleterious effects," including "prostitution and the criminal abuse and exploitation of young women." *Steakhouse, Inc. v. City of Raleigh,* 166 F.3d 634, 637 (4th Cir. 1999). Where alcohol is served in establishments offering nude or

seminude dancing, secondary blight is frequently reported. Disturbances involving lascivious conduct, drunkenness, larcenies, assaults and narcotics are common. See, *e.g., Steakhouse, Inc.,* 166 F.3d at 637; *California v. LaRue,* 409 U.S. at 111, 34 L. Ed. 2d at 347-48, 93 S. Ct. at 393.

The negative effects of combining alcohol with sexual stimulation was corroborated in this case by Dr. Allen Kodish, a practicing psychiatrist and member of the faculty at the University of Chicago. Dr. Kodish, who was called as a witness by the City, testified that alcohol consumption facilitates sexual and aggressive impulses and impairs social judgment. When combined with sexual stimulation, it produces an effect "associated with an increase in violent sexual acting out, acts of criminal behavior." Because of this, drinking alcohol while viewing naked or nearly naked dancers can lead a person to act on various impulses, including touching, screaming, and engaging in fights or other risky behavior. While not everyone who drinks alcohol reacts that way, Kodish explained that the combination of alcohol and sexual stimulation increases the likelihood that they will. In support of his conclusions, Kodish discussed a study entitled "The Effects of Male Social Drinking on Fantasy," which showed that increased alcohol intake is associated with increased sexual and aggressive thoughts.

The City also adduced testimony from Dr. Wesley Skogan, a professor of political science at Northwestern University and a member of the University's Institute for Policy Research. According to Professor Skogan, research shows that establishments serving alcohol attract a significant amount of additional crime. Such establishments create the opportunity for crime by bringing the potential victim and the criminal together. Victims become

more vulnerable because of alcohol's debilitating effects, thus creating an attractive situation for potential offenders. In explaining these circumstances, Professor Skogan discussed a number of studies and articles showing the relationship between alcohol consumption and crime. These studies, which demonstrated that establishments serving or selling alcohol do exacerbate crime, included "Bars, Blocks and Crime"; "Bars, Blocks and Crimes Revisited: Linking the Theory of Routine Activities to the Empiricism of 'Hot Spots'"; a study done on the City of Garden Grove, California; a report entitled "Additional Evidence that Taverns Enhance Nearby Crime"; and an article from the American Journal of Public Health. The Garden Grove study is particularly noteworthy because it showed that the combination of retail alcohol sales and adult uses created a higher incidence of crime than resulted from retail alcohol sales or adult uses operating in isolation.

The conclusions reported by Dr. Kodish and Professor Skogan were consistent with those reached by Thomas Smith, the assistant commissioner for zoning, whose testimony we discussed earlier in this opinion. Like Skogan, Smith consulted studies involving the experience of other municipalities. He also drew on his own experience as an urban planner and the problems Chicago had experienced in the past. As we have previously noted, the city also presented the testimony of veteran city police officer Roger O'Brien, who described in detail the abundance of criminal activity that occurred in the late 1970s and early 1980s when strip clubs serving alcohol proliferated. In addition, the City buttressed its position by presenting to the circuit court judicial decisions from other jurisdictions involving attempts to regulate adult

entertainment establishments, including strip clubs serving alcohol, within the confines of the first amendment.

Based on the foregoing, we believe that the evidentiary record here, as in *Ben's Bar,* fairly supported the rationale proffered by the City for the ordinance. That, however, does not end our inquiry. If the party challenging an ordinance can cast doubt on the municipality's rationale, either by demonstrating that the evidence adduced by the municipality does not support the proffered rationale or by furnishing evidence that disputes the municipality's factual findings, the burden will then shift back to the municipality to supplement the record with evidence renewing support for a theory that justifies the law. *World Wide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186, 1193 (9th Cir. 2004); *G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631, 639 (7th Cir. 2003).

In an attempt to trigger such a shift, Pooh Bah asserts that the City's evidence is fatally deficient because it did not include a study dealing specifically with the City of Chicago itself. Such an argument was specifically considered and rejected in *Ben's Bar.* We discussed the point previously and will state it again here. A municipality need not conduct new studies or produce evidence independent of that already generated by other cities before enacting an ordinance pertaining to the adverse secondary effects of adult entertainment establishments so long as whatever evidence the city does rely on is reasonably believed to be relevant to the problem the city is attempting to address. *Ben's Bar,* 316 F.3d at 725. We note, moreover, that the City's position here was supported by its own historical experience when strip clubs had been permitted to serve alcohol to patrons in the past. Where

actual experience from the municipality itself buttresses the conclusions reported in studies from other jurisdictions, those studies may be used by the municipality in support of its claims regarding negative secondary effects. See *XLP Corp.*, 359 Ill. App. 3d at 254.

Pooh Bah also challenges the City's position on the grounds that the studies upon which the City's witnesses relied contained scientific and methodological flaws. Pierre DeVise, a self-employed consultant retained by Pooh Bah, stated that he was not aware of studies showing a cause and effect relationship between liquor establishments featuring seminaked dancers and crime and did not believe that such a relationship existed. Peter Girandola, an assistant professor of psychology at the University of Kentucky, opined that there was no direct, positive relationship between viewing sexual stimuli and sexual "acting out behavior." In addition, Rolf Campbell, a planning and zoning consultant called to testify by Pooh Bah, stated that the seminude dancing conducted at Pooh Bah's club had no "negative impact on the orderly development of the immediately surrounding properties."

This testimony by Pooh Bah's experts was insufficient to trigger an obligation on the part of the City to supplement the record with additional evidence in support of its position. Campbell conceded, on cross-examination, that he had no opinion about the relationship between land use and crime and had conducted no research regarding the relationship between either alcohol or sexually oriented businesses and crime. DeVise actually admitted that a correlation has been shown to exist between sexually oriented businesses serving alcohol and increased incidence of crime, while Giranadola confirmed that alcohol consumption is related to a higher level of aggression. It is

true that the City adduced no information dealing specifically with the potential secondary effects of permitting liquor to be sold where the dancers were covered to the extent required by section 4-60-140(d) of Chicago's Municipal Code, but no precedent requires the City to obtain research targeting the exact activity that it wishes to regulate. The City is only required to rely on evidence "reasonably believed to be relevant" to the problem being addressed. The studies upon which the City relied regarding the secondary effects of alcohol sales and adult entertainment businesses satisfy that standard. See *Gammoh v. City of La Habra,* 395 F.3d 1114, 1133 (9th Cir. 2005).

We further note that the City's determination regarding the deleterious secondary effects of allowing adult entertainment establishments to serve liquor is entitled to a high degree of deference. "[A]necdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects." *World Wide Video of Washington, Inc. v. City of Spokane,* 227 F. Supp. 2d 1143, 1157 (E.D. Wash. 2002), *aff'd,* 368 F.3d 1186 (9th Cir. 2004), quoting *Stringfellow's of N.Y., Ltd. v. City of New York,* 91 N.Y.2d 382, 400, 694 N.E.2d 407, 417, 671 N.Y.S.2d 406, 416 (1998) cited with approval in *Center for Fair Public Policy v. Maricopa County,* 336 F.3d 1153, 1168 (9th Cir. 2003). The existence of academic studies said to indicate that the threatened harms are not real will not suffice to cast doubt on the local government's experience. See *City of Erie v. Pap's A.M.,* 529 U.S. 277, 300, 146 L. Ed. 2d 265, 285, 120 S. Ct. 1382, 1397 (2000) (plurality op.), citing *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 394, 145 L. Ed. 2d 886, 902, 120 S. Ct. 897, 908 (2000). The same is true of disagreement among academic experts. While the courts will not permit legislative bodies to rely on shoddy

data, we also will not specify the methodological standards to which their evidence must conform. *Gammoh v. City of La Habra,* 395 F.3d at 1133. The Chicago city council knows the streets of Chicago better than we do. See *Alameda Books,* 535 U.S. at 451-52, 152 L. Ed. 2d at 691, 122 S. Ct. at 1743. The experience of other jurisdictions and of the City itself leaves little doubt that the secondary harms to which section 4-60-140(d) of the Municipal Code are addressed are real and not merely conjectural.

Because enforcement of section 4-60-140(d) of the Chicago Municipal Code has been stayed during the pendency of these proceedings, Pooh Bah's club has continued to sell alcohol while presenting seminude dancing. The amount of documented criminal activity reported during that period has been limited. Contrary to Pooh Bah's view, however, we do not believe that this demonstrates that the City's professed concerns are unfounded.

While few in number, the particular incidents which have taken place at or around the club fall squarely within the type of activity shown by the evidence to be typical of establishments where alcohol and adult uses are combined. In addition to the incident discussed earlier in our opinion involving the customer who exposed himself and began masturbating in the middle of the club, the record reveals that police have been summoned to deal with assaults both inside and outside the club. The record also describes an incident in which a bartender was caught forging entries on credit card receipts to give herself higher tips.[14]

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[14] Incidents of prostitution were alleged as well, but it does not appear that any dancer or patron has yet been charged with prostitution or prostitution-related offenses.

Wholly aside from that, we note again that the City's historical experience with strip clubs licensed to sell alcohol by the drink was substantial. Negative secondary effects were serious and pervasive. Such widespread effects may not have recurred yet, but neither has the proliferation of strip clubs serving alcohol. Because of the adult use ordinances enacted in 1993, which includes the version of section 4-60-140(d) of the Municipal Code at issue in this case, and the prompt enforcement of section 4-60-140(d) against Pooh Bah, Pooh Bah is the only establishment in the City where patrons can purchase and consume alcohol while watching nude or seminude women perform erotic dances. Perhaps that makes it easier to police. Perhaps the criminal activity is more difficult to detect. Whatever the explanation, the absence or apparent absence of crime at Pooh Bah's club does not render the ordinance constitutionally suspect. The first amendment does not require a municipality to ignore its own experience, the experience of other jurisdictions, and concerns which the courts have held to be a matter of "common sense" (*Ben's Bar,* 316 F.3d at 726) merely because the feared secondary effects have not yet materialized in connection with a particular adult entertainment establishment. See *SOB, Inc. v. County of Benton,* 317 F.3d 856 (8th Cir. 2003) (public indecency ordinance banning live nude dancing upheld against first amendment challenge notwithstanding the existence of reports showing fewer police calls to the club than to a local gas station and suggesting that the value of properties near the club and another adult entertainment establishment had increased more from 1994 to 2001 than the value of properties near two businesses that did not feature nude dancing); *Artistic Entertainment, Inc. v. City of Warner Robins,* 223 F.3d 1306 (11th Cir. 2000) (that city council members may have

had no specific knowledge about crime patterns near venue presenting live nude dancing did not render ordinance prohibiting sale of alcohol there invalid under the first amendment).

Having thus concluded that the evidentiary record fairly supports the City's rationale for section 4-60-140(d) of the Municipal Code and that Pooh Bah has failed to cast direct doubt on that rationale, we next consider whether the ordinance is narrowly tailored to the problem to which it is addressed, namely, the negative secondary effects associated with the combination of alcohol sales and nude or semi-nude dancing. In order to satisfy the "narrow tailoring" requirement, a regulation need not be " 'the least restrictive or least intrusive means of [achieving the stated governmental interest].' " *Mastrovincenzo v. City of New York,* 435 F.3d 78, 98 (2d Cir. 2006), quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 105 L. Ed. 2d 661, 680, 109 S. Ct. 2746, 2757-58 (1989). Rather, the narrow tailoring requirement is satisfied so long as the substantial governmental interest which the law is designed to serve would be achieved less effectively in the law's absence and the law does not burden substantially more speech than is necessary to further the government's objective. *McGuire v. Reilly,* 260 F.3d 36, 48 (1st Cir. 2001); *Center for Fair Public Policy,* 336 F.3d at 1169.

That standard has clearly been satisfied here. Section 4-60-140(d) of the Municipal Code is tailored precisely to its objective: combating the negative secondary effects that flow from the combination of nude or seminude dancing and alcohol sales. *181 South, Inc. v. Fischer,* 454 F.3d 228 (3d Cir. 2006) (upholding against first amendment challenge state regulation forbidding erotic topless dancing in establishments licensed to sell liquor). There

is no question that the City's goal could not be achieved as effectively absent the ordinance. Indeed, prohibiting establishments from offering both alcohol and nude or seminude dancing is the only way the City can advance that interest. See *Ben's Bar,* 316 F.3d at 727. In addition, the ordinance goes no further than is essential to further the City's objective. Other courts which have considered similar laws have so held. See *2025 Emery Highway L.L.C. v. Bibb County,* 377 F. Supp. 2d 1310, 1336 (M.D. Ga. 2005) (requiring performers to "partially cover their breasts, buttocks, and genitals at venues where alcohol is sold 'is certainly the least restriction possible which would still further the [government's] interest in controlling the combustible mixture of alcohol and nudity' "), quoting *Sammy's of Mobile Ltd. v. City of Mobile,* 140 F.3d at 997; *Ben's Bar,* 316 F.3d at 727; *Wise Enterprises, Inc. v. Unified Government of Athens-Clarke Co.,* 217 F.3d 1360, 1365 (11th Cir. 2000).

Our final inquiry under step four of the test set forth in *Ben's Bar* is whether reasonable alternative avenues of communication remain available. The answer to that inquiry is unquestionably yes. As in *Ben's Bar,* the ordinance regulates nude and seminude dancing and the consumption of alcohol, but prohibits neither. The City of Chicago still offers innumerable opportunities for the sale and consumption of alcohol by the drink. It also permits venues to offer nude and seminude dancing, and such establishments operate lawfully in the City featuring performers who wear even less than the dancers at Pooh Bah's club. The only thing the City does not permit is for the two activities to be combined on the same premises and at the same time. Such a restriction is within the City's authority to impose, for the first amendment does

not entitle a bar, its dancers or its patrons to have alcohol available during a presentation of nude or seminude dancing. *Ben's Bar,* 316 F.3d at 726, 728.

In that regard, we note that the record is utterly devoid of any testimony suggesting, directly or indirectly, that the availability of liquor bears in any way on the expressive component of the dancers' performances. Dancer Rachel Shaw, who testified under her stage name, Samantha, described her message as fantasy and fun, "the idea that the customer can have a beautiful stranger take their clothes off and dance for them and feel special." Melissa Candelaria, known at the club as "Malibu," repeated the fantasy theme. "It's a fantasy," she said, "of being their girl, which you never will, basically." Candelaria's objective included a pragmatic element as well. When dancers are up on the main stage, Candelaria testified, "[w]e want to be noticed so that we can get a table dance when we get off the stage."

Cynthai Sudheimer, whom Pooh Bah patrons will recognize as "Christy," tries to convey the idea that she is "untouchable * * * like a star * * * , somebody that is a step above, higher, glamour-type person that is put up from everybody else." When asked at trial whether she had a message which she tries to convey on stage, "Star," whose actual name is Sara Jean Levorson, explained that she attempts to portray "my fantasy, sex appeal * * * like having a good time, having a lot of fun." For Rhonda Bobo, who performs as "Kori Adams," the objective is to communicate to the audience who she is, that she is comfortable being onstage, that she is "here and available to entertain," and that she is "strong, confident, sexy, beautiful." Similarly, Vickie Bernal, a/k/a "Lee," viewed her performances as relating the message that women are beautiful.

She wants her customers to look not only at her body, but also at her hair and her face. "I try to have them appreciate the whole me as a beautiful woman," she testified, "not just the body."

We cannot see and Pooh Bah has not suggested any reason why any of these messages cannot be expressed with equal effectiveness or viewed by patrons with equal appreciation absent the ability of those patrons to buy and consume alcohol while the performances are taking place. In *Ben's Bar,* 316 F.3d at 728, the Seventh Circuit postulated that prohibiting alcohol sales where nude or seminude dancing occurs may cause performers to suffer a reduction in tips. Based on the record, we are not sure that is necessarily so in this case. Testimony by some dancers indicated that they also work or have worked at different strip clubs where alcohol is not served, and it is not at all clear that any disparity existed between what they were paid at those establishments and what they earned at Pooh Bah's club. The situation with the club itself is different. Testimony by the club's owner suggests that the club's income would probably fall substantially if it could not offer alcohol along with nude and seminude dancing. That, however, is of no consequence. While the first amendment does require that establishments like the club be given a "reasonable opportunity" to disseminate protected speech, a "reasonable opportunity" does not include a concern for economic considerations. *Ben's Bar,* 316 F.3d at 726-27, citing *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 54, 89 L. Ed. 2d 29, 42, 106 S. Ct. 925, 932 (1986).

As an alternative basis for challenging section 14-60-140(d) of the Chicago Municipal Code, Pooh Bah contends that the ordinance is overbroad. Overbreadth is a

judicially created doctrine which recognizes an exception to the established principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court. Under the doctrine, a party being prosecuted for speech or expressive conduct may challenge the law on its face if it reaches protected expression, even when that person's own activities are not protected by the first amendment. The reason for this special rule in first amendment cases is apparent: an overbroad statute might serve to chill protected speech. A person contemplating protected activity might be deterred by the fear of prosecution. The doctrine reflects the conclusion that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. *Bates v. State Bar of Arizona,* 433 U.S. 350, 380, 53 L. Ed. 2d 810, 833-34, 97 S. Ct. 2691, 2707 (1977).

The doctrine's tolerance is not unbounded. "[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Virginia v. Hicks,* 539 U.S. 113, 119, 156 L. Ed. 2d 148, 157, 123 S. Ct. 2191, 2197 (2003), quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 37 L. Ed. 2d 830, 842, 93 S. Ct. 2908, 2917 (1973). Like most exceptions to established principles, the doctrine must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. *New York v. Ferber,* 458 U.S. 747, 769, 73 L. Ed. 2d 1113, 1130, 102 S. Ct. 3348, 3361

(1982). Its concern with "chilling" protected speech attenuates as the otherwise unprotected behavior that it forbids the state to sanction moves from pure speech toward conduct and that conduct, even if expressive, falls within the scope of otherwise valid laws. *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 40, 145 L. Ed. 2d 451, 460, 120 S. Ct. 483, 489 (1999), quoting *Ferber,* 458 U.S. at 770, 73 L. Ed. 2d at 1131, 102 S. Ct. at 3361, quoting *Broadrick,* 413 U.S. at 615, 37 L. Ed. 2d at 842, 93 S. Ct. at 2917.

Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct would otherwise be punishable despite the first amendment, the Court has characterized the overbreadth doctrine as "strong medicine" and employed it with hesitation, and only as a last resort. *New York v. Ferber,* 458 U.S. at 769, 73 L. Ed. 2d at 1130, 102 S. Ct. at 3361. Where, as here, conduct and not merely speech is involved, the overbreadth of the statute must be not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. "We will not topple a statute," the United States Supreme Court has held, "merely because we can conceive of a few impermissible applications." *Massachusetts v. Oakes,* 491 U.S. 576, 595, 105 L. Ed. 2d 493, 509, 109 S. Ct. 2633, 2644 (1989). The claimant challenging the law as being unconstitutionally overbroad bears the burden of demonstrating, " 'from the text of [the law] and from actual fact,' " that substantial overbreadth exists. *Virginia v. Hicks,* 539 U.S. at 122, 156 L. Ed. 2d at 159, 123 S. Ct. at 2198, quoting *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 14, 101 L. Ed. 2d 1, 17, 108 S. Ct. 2225, 2234 (1988).

More than 50 years after its inception, first amendment overbreadth doctrine remains little understood. R. Fallon, *Making Sense of Overbreadth,* 100 Yale L.J. 853 (1991). Courts and litigants sometimes fail to heed the requirement (see *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 799-800, 80 L. Ed. 2d 772, 783, 104 S. Ct. 2118, 2126 (1984)) that a statute's overbreadth be both real and substantial. An example of such a lapse appears in *Eggert Group, L.L.C. v. Town of Harrison,* 372 F. Supp. 1123, 1137 (E.D. Wis. 2005). In invalidating as overbroad an ordinance similar to the one at issue here prohibiting nude dancing in establishments licensed to serve alcohol, a federal magistrate accepted the strip club's contention that the law would prevent the La Leche League from conducting a demonstration of how to breast-feed properly. Although Dr. Jack Newman, member of the La Leche League International Health Advisory Council, has been quoted as stating that "[r]easonable alcohol intake [by nursing mothers] should not be discouraged at all" (see www.lalecheleague.org/FAQ/alcohol.html), we think it unlikely to the point of absurdity that a La Leche League chapter would consider holding an educational meeting about nursing techniques for new mothers in a bar, especially considering that mothers typically bring their new babies and sometimes the babies' siblings to those meetings. Moreover, even if a La Leche League meeting were held in a bar, it is by no means obvious that the women's breast-feeding would run afoul of the law. Contrary to the magistrate's apparent belief, the process of nursing a baby does not necessarily require exposure of the mother's breast to public view.

The magistrate in the same case also thought the law was overbroad because "certain all-female educational

demonstrations for all-female audiences would be prohibited" at establishments licensed to sell liquor. What the magistrate had in mind here eludes us completely. Are there women who want to conduct educational seminars in bars where the program entails exposing their breasts or genitals or engaging in real or simulated sexual contact, which is the kind of conduct they would have to undertake to trigger the law's prohibitions?[15] Perhaps, but no concrete examples were noted or even hinted at. Rather than being drawn from actual fact, the magistrate's example seems completely made up. In our view and under the standards articulated by the United States Supreme Court, extreme and unfounded hypotheticals of this kind are wholly inadequate to establish that a law is overbroad.

With these thoughts in mind, we believe, as the appellate court did, that Pooh Bah failed to meet its burden of demonstrating that section 4-60-140(d) of the Chicago Municipal Code suffers from substantial overbreadth. The club's contention is that the ordinance suffers from overbreadth because its prohibitions would apply to nude and seminude performances at any venue licensed to sell alcohol, including those which feature legitimate theater and country clubs where swim meets and water shows take place, and the City has not shown that the secondary effects to which the ordinance is directed would flow from such performances. This argument is untenable.

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[15] Considering the type of conduct addressed by the ordinance, the "all-female" demonstrations for "all-female" audiences described by the magistrate evoke images of a Roman bacchanalia rather than a serious educational program. The authority to restrict such "bacchanalian revelries," the United States Supreme Court has affirmed, is within the inherent police power of the state. *44 Liquormart*, 517 U.S. at 515, 134 L. Ed. 2d at 735, 116 S. Ct. at 1514.

As a preliminary matter, we cannot imagine and Pooh Bah has not explained what kind of country club water shows it has in mind. If country clubs are presenting water shows featuring nude or seminude female performers, and Pooh Bah has presented nothing to substantiate that such shows have been held or even planned for Chicago or anywhere else, the incidence of such performances is surely small. Any overbreadth would therefore be insignificant when compared to the plainly legitimate reach of the ordinance. The swim meet hypothetical is also unpersuasive. By its terms, the ordinance pertains only to "employees," "entertainers," or "patrons" engaged in "live act[s], demonstration[s], dance[s], or exibition[s]." Giving those terms their plain and commonly understood meaning, the ordinance could have no possible application to racers in a swimming competition.[16]

With respect to the example involving venues offering legitimate theater, the City observes, as it did below, that under its liquor licensing ordinances, the "premises" for which it issues licenses consist of the enclosed location where the alcohol is stored or displayed. That definition embraces the stage and seating areas at Pooh Bah's club, but would not include the stage and seating areas in a normal theater. The City does not issue licenses that cover stage and seating areas in such theaters. By local ordinance, the sale of alcohol in theaters is confined to the lobby area and limited to one hour before the performance

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[16] While we do not purport to be experts on competitive sports gear, we further point out something of which anyone who has watched the Summer Olympics is aware. The outfits typically worn by competitive female swimmers provide considerably more coverage than the City requires of strippers who perform where alcohol is served.

and during the intermission. Section 14-60-140(d) of the Municipal Code is therefore inapplicable to stage performances at conventional theaters in the City.

In any event, we note again that the ordinance does not actually even forbid any speech or expressive conduct. Nude or seminude dancing is perfectly lawful in the City. This ordinance merely prohibits such performances from being combined with the sale and consumption of alcohol. Under the law, the combination of live nude or seminude dancing and the sale and consumption of alcohol is not allowed anywhere, regardless of the quality, character, or content of the performance. In this respect, the expansiveness of the ordinance is a virtue, rather than a vice, for it is evidence that the ordinance does not discriminate against a particular message or point of view. See *Hill v. Colorado*, 530 U.S. 703, 731, 147 L. Ed. 2d 597, 621, 120 S. Ct. 2480, 2497 (2000). Moreover, because the first amendment does not entitle a licensed liquor establishment, its performers or its patrons to have alcohol available during live nude or seminude performances (*Ben's Bar*, 316 F.3d at 727; *Sammy's of Mobile*, 140 F.3d at 999 ("we are unaware of any constitutional right to drink while watching nude dancing")), enforcement of the ordinance at other types of establishments licensed to serve alcohol by the drink would no more trench on their first amendment rights than it does on the first amendment rights claimed by Pooh Bah. Like the conduct at issue here, the conduct at those other establishments would be encompassed within the ordinance's legitimate sweep. The ordinance is

therefore not overly broad. *Hill v. Colorado*, 530 U.S. at 732, 147 L. Ed. 2d at 621, 120 S. Ct. at 2498.[17]

Pooh Bah next argues that section 14-60-140(d) of the Municipal Code violates the fourteenth amendment to the United States Constitution (U.S. Const., amend. XIV) because it is too vague. A statute can be impermissibly vague for either of two independent reasons: (1) if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) if it authorizes or even encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. at 732, 147 L. Ed. 2d at 621, 120 S. Ct. at 2498.

A party may raise a vagueness challenge by arguing either that a statute is vague as applied to the facts at hand, or that a statute is void on its face. The first type of challenge, as its name suggests, evaluates a statute in the context of the specific circumstances in which it was applied to the litigant who contests its validity. If the litigant's own conduct falls squarely within the statute's prohibitions, he cannot complain of the vagueness of the law as applied to others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 71 L. Ed. 2d 362, 369, 102 S. Ct. 1186, 1191 (1982).

With respect to the second type of challenge, a statute is normally not unconstitutional on its face unless it provides no standard of conduct at all, *i.e.*, the ambiguity

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[17] By its terms and as applied by the City of Chicago, the ordinance pertains only to acts, demonstrations, dances, or exhibitions which are "live." It therefore has no possible application to movies, television broadcasts or displays of artwork. Pooh Bah makes no argument to the contrary. Accordingly, we need not consider such activities in assessing the reach of the ordinance.

is so pervasive that it is incapable of any valid application. *People v. Fabing,* 143 Ill. 2d 48, 55 (1991), quoting *Steffel v. Thompson,* 415 U.S. 452, 474, 39 L. Ed. 2d 505, 523, 94 S. Ct. 1209, 1223 (1974). Facial challenges to legislation are generally disfavored. *National Endowment for the Arts v. Finley,* 524 U.S. 569, 580, 141 L. Ed. 2d 500, 511, 118 S. Ct. 2168, 2175 (1998), quoting *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223, 107 L. Ed. 2d 603, 616, 110 S. Ct. 596, 603 (1990). The courts have held, however, that when a law threatens to inhibit the exercise of constitutionally protected rights such as those protected under the first amendment, the Constitution demands that a more stringent vagueness test be applied. In such a scenario, a statute is void for vagueness if it reaches a substantial amount of constitutionally protected conduct. *United States v. Marzook,* 383 F. Supp. 2d 1056 (N.D. Ill. 2005).

Because of the requirement that a statute must reach a substantial amount of constitutionally protected speech, the facial vagueness and overbreadth analyses are cognate. *Record Head Corp. v. Sachen,* 682 F.2d 672, 674 (7th Cir. 1982). For reasons discussed in connection with Pooh Bah's overbreadth claim, the club failed to establish that section 14-60-140(d) of the Municipal Code reaches a substantial amount of speech or expressive conduct protected by the first amendment. As a result, just as the club cannot assert a valid overbreadth claim, it likewise cannot attack the ordinance on the grounds that it is unconstitutionally vague on its face.

Pooh Bah's vagueness claim can succeed, if at all, only if the club can establish that the ordinance is vague as applied. While not clearly defined, Pooh Bah's vagueness argument appears to rest on the first of the two reasons on which vagueness challenges may be based, namely, that

persons of ordinary intelligence could only guess at its meaning. The particular terms or phrases with which Pooh Bah took issue below were "buttocks," "any portion of the female breast at or below the areola thereof," "shall be considered exposed to public view if it is uncovered or is less than completely and opaquely covered," and "any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region." The appellate court rejected Pooh Bah's arguments regarding these provisions, finding that the meaning of the challenged language was apparent and perfectly intelligible. In our court, Pooh Bah has narrowed it focus. Its arguments now center on the meaning of "buttocks," "any portion of the female breast at or below the areola thereof," and "less than completely and opaquely covered."

The tests for assessing whether a law is vague are not capable of mechanistic application. Business regulations, for example, may be less precise than other forms of legislation because the entities affected by such regulations are more apt to know where the lines are drawn and more able to obtain clarification through inquiry or administrative proceedings. Civil legislation can be vaguer than criminal laws because the consequences of imprecision are qualitatively less severe. *Record Head Corp. v. Sachen,* 682 F.2d at 674. In any context, moreover, there are limits to the degree of precision attainable by the English language. The United States Supreme Court has therefore recognized that "'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Anderson v. Milwaukee County,* 433 F.3d 975, 978 (7th Cir. 2006), quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 105 L. Ed. 2d 661, 677,

109 S. Ct. 2746, 2755 (1989). We must also remain mindful that when judging the constitutionality of a rule or statute, common sense cannot and should not be suspended. *Anderson v. Milwaukee County,* 433 F.3d 975, 978 (7th Cir. 2006).

The clarity of the term "buttocks" has frequently been addressed by courts in the context of challenges to laws and regulations pertaining to nudity. See *Giano v. Senkowski,* 54 F.3d 1050, 1057 (2d Cir. 1995); *Dodger's Bar & Grill v. Johnson County Board of County Commissioners,* 32 F.3d 1436, 1444 (10th Cir. 1994); *Geaneas v. Willets,* 911 F.2d 579, 586-87 (11th Cir. 1990); *Wayside Restaurant, Inc. v. Virginia Beach,* 215 Va. 231, 236, 208 S.E.2d 51, 55 (1974). These courts have consistently found that the term can be understood by persons of ordinary intelligence. We see no possible basis for reaching a contrary conclusion in this case. We likewise see no grounds for holding that the phrase "less than completely and opaquely covered" is not sufficiently clear to provide a person of ordinary intelligence a reasonable opportunity to understand what it requires. Moreover, and more importantly, even if there might be some circumstances in which the meaning and applicability of these terms might be uncertain, such circumstances are not present here. The T-bars worn by Pooh Bah dancers covered the area between their buttocks, including the anus, but left the buttocks themselves completely uncovered. Their conduct thus fell squarely and unambiguously within the ordinance's prohibitions. As a result, Pooh Bah will not be heard to complain that the law is vague as applied to its dancers.

The same is true of that portion of the ordinance prohibiting the exposure of "any portion of the female breast at or below the areola thereof." Pooh Bah's policy

required only that dancers apply a latex and makeup covering to their nipples, areolas and triangular areas extending below the areolas in the frontal portion of each breast. Evidence was presented that the actual makeup and latex covering did not even cover that much. From the photographic and video exhibits included in the record and the testimony of the investigating police officers, there is no indication of any covering beyond the nipples and areolas. Even those areas would appear totally nude except for the fact that their natural color was obscured. Whatever the actual coverage, however, there is no dispute that it did not extend to the lateral portions of the breasts below the tops of the areolas. The sides of the dancers' breasts were left completely uncovered. Courts considering similar laws have held that persons of ordinary intelligence could reasonably be expected to understand that the portion of the female breast at or below the areola would include the entire portion of the female breast at or below the areola, including the sides. See *City of Daytona Beach v. Del Percio,* 476 So. 2d 197, 200 (Fla. 1985) (language refers to portion of breast directly or laterally below the top of the areola); *State v. Fantasia Restaurant & Lounge, Inc.,* Nos. 0112001060, 0109002426, 0112000958 cons., slip op. at 10 (Del. Super. Ct. 2004) (term refers to "entire area of the entire breast below the top of the areola, not simply the strip of flesh the width of the areola below the top of the areola"). That is precisely how the ordinance was understood by regulatory authorities in the City, and we agree that it is how persons of ordinary intelligence would understand it. Pooh Bah and its dancers therefore cannot complain that they were not given fair notice that their latex and makeup practices were insufficient to meet the requirements of section 14-60-140(d) of the Municipal Code. Application of the ordinance to them does not violate

their rights to due process under the fourteenth amendment.

Pooh Bah's final contention is that even if section 14-60-140(d) of the Municipal Code does not contravene the first and fourteenth amendments to the United States Constitution, we should declare it invalid under the "freedom of speech" provision of the Illinois Constitution of 1970 (Ill. Const.1970, art. I, §4). That provision guarantees that "[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty." Ill. Const. 1970, art. I, §4. The relationship between article I, section 4, of the Illinois Constitution and the first amendment to the United States Constitution was discussed by this court in *People v. DiGuida,* 152 Ill. 2d 104 (1992). After reviewing the history of the provision and the discussion of its terms at the 1970 Constitutional Convention, we concluded that the framers recognized that the Illinois Constitution may provide greater protection to free speech than does its federal counterpart. *People v. DiGuida,* 152 Ill. 2d at 121. We therefore rejected "any contention that free speech rights under the Illinois Constitution are in all circumstances limited to those afforded by the Federal Constitution." *People v. DiGuida,* 152 Ill. 2d at 122. This, however, does not end our inquiry.

That article I, section 4, of our constitution may afford greater protection than the first amendment in some circumstances does not mean that greater protection is afforded in every context. See *Ino Ino, Inc. v. City of Bellevue,* 132 Wash. 2d 103, 115, 937 P.2d 154, 162 (1997). Construing a state constitutional provision nearly identical to ours, the Washington Supreme Court noted that the provision, by its terms, referred only to speaking, writing and publishing. No mention was made of expressive

conduct. The court recognized that the provision had been found to warrant greater protection than the first amendment for speech, both spoken and written, in some contexts. In the absence of language relating to expressive conduct, however, the court ruled that the text of the state constitution did not justify extending greater protection to nude and seminude dancing at adult cabarets than would be afforded by the first amendment. *Ino Ino, Inc. v. City of Bellevue,* 132 Wash. 2d at 117, 937 P.2d at 163.

Courts in other jurisdictions applying state constitutional provisions which are similar (and in some cases nearly identical) to article I, section 4, of the Illinois Constitution of 1970 have likewise held that their state constitutions provide no greater protection to nude or seminude dancing than is conferred by the first amendment. See *Empress Adult Video & Bookstore v. City of Tucson,* 204 Ariz. 50, 62, 59 P.3d 814, 826 (App. 2002) (collecting various cases); *Junction 615, Inc. v. Liquor Control Comm'n,* 135 Ohio App. 3d 33, 41, 732 N.E.2d 1025, 1031 (1999) (state restriction on public nudity in liquor establishments upheld on grounds that it "did not restrict First Amendment rights any more than necessary" and the "free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment"); *Ranch House, Inc. v. City of Anniston,* 678 So. 2d 745, 746-47 (Ala. 1996) (state constitution's free speech protections did not invalidate local ordinance prohibiting nudity or partial nudity in businesses that sell or dispense alcohol); *Knudtson v. City of Coates,* 519 N.W.2d 166, 169-70 (Minn. 1994) (prohibition against nude dancing in establishments licensed to sell alcohol upheld against state constitutional challenge); *S.J.T., Inc. v. Richmond County,* 263 Ga. 267, 269, 430 S.E.2d 726, 728-29 (1993) (same); *City of Billings*

v. Laedeke, 247 Mont. 151, 157-58, 805 P.2d 1348, 1352 (1991) (same); *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 203-04 (Fla. 1985) (similar).[18] Although the Supreme Judicial Court of Massachusetts reached a contrary result in *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978), we find the majority view more persuasive. Consistent with that view, we find no basis for concluding that article I, section 4, of the Illinois Constitution affords greater protection to nude and seminude dancing in establishments licensed to sell alcohol than is provided by the federal constitution. Pooh Bah's argument that section 14-60-140(d) of the Chicago Municipal Code is invalid under article I, section 4, of the Illinois Constitution is therefore rejected.

Because section 14-60-140(d) of the Municipal Code does not violate either the United States or the Illinois Constitution, the circuit court erred in concluding that the ordinance could not serve as the predicate for revoking Pooh Bah's liquor license revocation or enjoining its operation on the grounds that it constituted a public nuisance. The appellate court therefore acted properly in reversing the circuit court's judgment and remanding for

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[18] In *Bellanca v. New York State Liquor Authority*, 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981), a case cited by Pooh Bah, New York's highest court held, on remand from the United States Supreme Court in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 69 L. Ed. 2d 357, 101 S. Ct. 2599 (1981), that a liquor control statute banning topless dancing in premises licensed to sell alcohol did violate the state constitution's guarantee of freedom of expression. In reaching that result, however, the court specifically noted that it was not reaching the question of whether the state constitution's free speech guarantee was broader than the guarantee of the first amendment to the United States Constitution. *Bellanca*, 54 N.Y.2d at 234, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

further proceedings. The City urges us to dispense with the remand and enter judgment in its favor now. This we decline to do. Because the circuit court's judgment turned on the constitutionality of the ordinance, the circuit court did not reach the non-constitutional issues raised by Pooh Bah on administrative review of its liquor license, nor did it fully resolve the merits of the City's claim for injunctive relief. We believe that those matters should be addressed by the circuit court in the first instance. We will not supplant its function. Our purpose on this interlocutory appeal was to finally determine the relevant constitutional questions. That has been done.

Pooh Bah argues that on remand it should be permitted to present additional evidence on the question of whether the ordinance actually creates the secondary effects claimed by the City. This argument is untenable. The sole reason Pooh Bah seeks to present such evidence is to renew and bolster its contention that the ordinance violates constitutional standards. For purposes of this appeal, however, the constitutionality of the ordinance is no longer subject to dispute. Our holding that the ordinance does not violate the United States or Illinois constitutions is conclusive of the issue and shall be binding on the parties and on the circuit court on remand.

For the foregoing reasons, the judgment of the appellate court, reversing the judgment of the circuit court and remanding the cause, is affirmed.

Appellate court judgment affirmed.

JUSTICE BURKE took no part in the consideration or decision of this case.

SUPREME COURT OF ILLINOIS

Springfield, Illinois, March 5, 2007

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

No. 99804 – City of Chicago, appellee, v. Pooh Bah Enterprises, Inc., et al., appellants. Appeal, Appellate Court, First District.

Petition for rehearing denied.
Burke, J., took no part.

Freeman, J., dissenting upon denial of rehearing.

Dissent attached.

Dissent Upon Denial of Rehearing

JUSTICE FREEMAN, dissenting:

I initially joined the majority opinion in this case. I believe, however, that many of the points raised by Pooh Bah in its petition for rehearing merits this court's further consideration. Specifically, I am concerned, as noted by Pooh Bah in its rehearing petition, that this court's opinion "ignores" several substantive first amendment issues, violates the "constitutionally required procedures for intermediate scrutiny * * * resulting in a denial of due process to Pooh Bah," and contains "errors, omissions and distortions of the record." Because I believe that this case deserves further reflection, and because this court has not seen fit to use rehearing as a means of addressing these points, I can no longer join the majority in its opinion. Accordingly, I dissent from the court's denial of rehearing in this cause.

First, as Pooh Bah notes in its petition for rehearing, the court's opinion in the matter at bar completely overlooks Pooh Bah's argument that strict scrutiny analysis should be applied to section 4-60-140(d) of the Chicago Municipal Code (the "coverage ordinance"). In its written submissions to this court, Pooh Bah strongly relied upon two decisions from the United States Supreme Court in support of its assertion that strict scrutiny is applicable to the ordinance at issue in this case: *United Stares v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000), and *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 152 L. Ed. 2d 403, 122 S. Ct. 1389 (2002). Pooh Bah asserted that the challenged ordinance is content-relates, on the basis that the law applies solely to erotic entertainment and because its effect and purpose is

to limit erotic expression by regulating the body coverage on erotic performers. According to Pooh Bah, the City's justification for the ordinance rests in part on the alleged *primary* effect of the erotic expression on the audience, *i.e.*, that the combination of alcohol and seminude dancing prompts viewing-and-drinking patrons to commit crime or become victims of crime when they leave the club. Pooh Bah noted that this is the direct opposite of a content-neutral justification. Therefore, Pooh Bah reasoned, because the challenged ordinance was not sought to be justified solely by content-neutral reasons – but also by the putative primary effects of the combination of alcohol and erotic dancing on the viewers – the City's proffered justification requires strict scrutiny review.

As stated, in support of this proposition, Pooh Bah relied upon the *Playboy* and *Ashcroft* decisions, in which the United States Supreme Court struck down on first amendment grounds federal statutes which attempted to regulate sexually oriented cable television programming and child pornography. See *Playboy*, 529 U.S. at 826-27, 146 L. Ed. 2d at 887-88,120 S. Ct. at 1893 (provision of the Telecommunication Act which attempted to prevent "signal bleed" by requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours violated first amendment); *Ashcroft*, 535 U.S. at 258, 152 L. Ed. 2d at 426, 122 S. Ct. at 1406 (certain provisions of the Child Pornography Prevention Act of 1996 – including a ban on virtual child pornography – found to violate the first amendment). In both instances, the Court concluded that the challenged statute were subject to strict scrutiny analysis because they had a content-related intent or purpose. *Playboy*, 529 U.S. at 811-13, 146 L. Ed. 2d at 878-79, 120 S. Ct.

at 1885-86; *Ashcroft*, 535 U.S. at 253-54, 152 L. Ed. 2d at 422-23, 122 S. Ct. at 1403. In its petition for rehearing before this court, Pooh Bah contends that this court's opinion should, at the very least, "distinguish *Playboy* and *Ashcroft* and explain why non-obscene Gentlemen's Clubs in Illinois get less constitutional protection than graphic sexual activities shown on cable TV or than child molesters under the First Amendment"I agree.

The opinion of this court overlooks both of these recent United States Supreme Court free speech cases on which the defendants strongly rely for their strict scrutiny argument. Rather than directly address a central argument debated at length by the parties in this case and engage in a thoughtful analysis of these contentions, the court simply relegates this important debate to a brief footnote in the opinion. In footnote 12 of this court's opinion (slip op. at 20 n. 12), this court notes, in passing, that "Pooh Bah argues that the strict scrutiny standard should govern this case." The footnote further states that "[f]or the reasons set forth later in this opinion, Pooh Bah is incorrect." This is the extent of the discussion the court provides with respect to the strict scrutiny argument raised in this appeal. The court rejects Pooh Bah's strict scrutiny argument without further direct analysis or explanation, despite the fact that, in its written submissions to this court, the City justified its challenged ordinance, in part, on the basis of the claimed effect of the expression – erotic seminaked dancing – on the club's patrons, in support of the theory that the patrons then are more likely to commit or be victims of crime. Accordingly, by virtue of this argument, the City itself has invited application of the line of cases culminating in the *Playboy* and *Ashcroft* decisions, which apply the higher strict

scrutiny standard to laws directed at the impact of speech on its listeners or watchers.

Furthermore, the court rejects Pooh Bah's assertions that strict scrutiny applies in this case despite the fact that in its opinion the court itself resorts to anecdotal evidence of the supposed *primary* effects of the combination of alcohol and live seminaked dancing on its viewers, noting, *e.g.*, the "customer, who exposed himself and began masturbating in the middle of the club." Slip op, at 33. In addition, the court discusses the testimony of the City's expert, Dr. Kodish, which focused upon the psychiatric effects on males resulting from the combination of alcohol and sexual stimulation. According to Dr. Kodish, this combination produces an effect "'associated with an increase in violent sexual acting out, acts of criminal behavior.'" Slip op. at 29. Because this court justifies the City's coverage ordinance in part by the supposed effects of the regulated conduct on its audience, this court's own analysis triggers a discussion of whether strict scrutiny review is applicable in this case.

The court sidesteps any discussion of strict scrutiny review by relying heavily upon the decision of the United States Court of Appeals for the Seventh Circuit in *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cit. 2003). That decision applies an intermediate scrutiny analysis to the review of a local ordinance regulating "sexually oriented businesses," without detailed consideration as to whether or not strict scrutiny is triggered by the challenged law or the justification advanced for that law. However, I note that, in *Ben's Bar*, the applicable level of scrutiny was not at issue and that the parties agreed that intermediate scrutiny was the applicable standard for first amendment review. No party in that case advocated for

strict scrutiny analysis, and, therefore, it was appropriate for the court in that case not to address the issue of which standard of review applied. In contrast, in the matter before us, Pooh Bah has vigorously argued from the moment it filed its petition for leave to appeal with this court that strict scrutiny review applies. This court's opinion, therefore, should address Pooh Bah' s arguments with respect to the application of strict scrutiny analysis and either distinguish or apply the *Ashcroft* and *Playboy* decisions – two decisions which remain conspicuously absent from this court's opinion. In its opinion, this court evades the strict scrutiny argument and automatically applies intermediate scrutiny simply because a governmental body claims that the purpose of the challenged ordinance is to attack alleged negative secondary effects.

I am deeply troubled by the court's out-of-hand dismissal of Pooh Bah's strict scrutiny argument for several additional reasons. First, such conduct on the part of this court denies the parties to this action the reassurance that we have carefully considered and deliberated their arguments. What message does this court send to litigants when it does not even bother to address the central arguments raised in their appeals, especially when they are issues of constitutional magnitude? I venture to say that it creates the perception that this court has predetermined the outcome of the appeal and does not deem it necessary to bother with arguments that may cut in the opposite direction. In addition, by failing to address and fully analyze an issue such as whether strict scrutiny applies to the ordinance challenged in this case, this court fails to provide the bench and bar with the guidance needed to deal with similiar issues in future cases. Indeed, the legal community "rel[ies] on our opinions to map the evolving

course of law." *People v. Jung*, 192 Ill. 2d 1, 17 (2000) (McMorrow, J., specially concurring, joined by Miller and Freeman, 3J.). This court has utterly failed to carry out this mission in the instant cause.

In its petition for rehearing, Pooh Bah also takes issue with this court with respect to several aspects of its intermediate scrutiny review of the City's coverage ordinance. In its opinion, the court uses the following test from the *Ben's Bar* decision to determine whether the challenged coverage ordinance withstands intermediate scrutiny review. Under this test, a challenged law is constitutional if:

> "'(1) the State is regulating pursuant to a legitimate governmental power [citation]; (2) the regulation does not completely prohibit adult entertainment [citation]; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments [citation]; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available [citation]; *or*, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. [Citation.]' (Emphasis in original) *Ben's Bar*, 316 F.3d at 722." Slip op. at 19-20.

I agree with my colleagues that the weight of precedent requires this court to uphold the City's coverage ordinance against a facial challenge of its constitutionality. It is well settled that local governments can ban nudity itself, including partial nudity such as topless entertainment.

See, *e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991). I am satisfied that the coverage ordinance falls within the ambit of decisions that have upheld government regulations of sexually oriented businesses against facial challenges based upon secondary-effects justifications.

However, Pooh Bah argues on rehearing that this court in its opinion has completely overlooked its argument that the City's coverage ordinance is violative of the first amendment *as applied* to Pooh Bah's specific factual situation. I agree with Pooh Bah, and disagree with the court's conclusion that the first amendment analysis is appropriately ended in this case with its holding that the coverage ordinance withstands a facial challenge. The court declines to fully address Pooh Bah's as-applied challenge to this ordinance and disregards the incompleteness of the proceedings below with respect to that challenge.

The first of Pooh Bah's specific points in its petition for rehearing with respect to this court's intermediate scrutiny analysis is its contention that this court's opinion violates "the constitutionally required procedures for intermediate scrutiny review," thereby "resulting in a denial of due process to Pooh Bah." Pooh Bah takes issue with this court's denying it an opportunity to complete its attack on the City's secondary-effects justification for the challenged ordinance on remand. Pooh Bah notes that this court denies it this opportunity not only despite the fact that the circuit court had entered a directed verdict in Pooh Bah's favor finding that the ordinance was unconstitutional after the City had rested its case in chief and before Pooh Bah had completed presentation of its own evidence in rebuttal, but also despite the fact that the

circuit court specifically reserved to Pooh Bah the right to present additional evidence in the event that the court's decision was subsequently overturned on appeal.

The record reflects that the circuit court ruled in Pooh Bah's favor and against the City on January 18, 2001. On that date, the circuit court judge filed a very detailed memorandum opinion and order, However, on May 3, 2001, the circuit court judge – with the agreement of the parties – amended the January 18, 2001, memorandum opinion and order *nunc pro tunc* by entering a series of three additional orders. One order entered on May 3, 2001, was entitled "Partial Judgment Order," and this order notes that the cases had been before the circuit court on "Pooh Bah's motions for directed findings and for judgment at the conclusion of the City's case-in-chief." The order further recounts that the parties had entered into a "stipulation submitting the cases for a ruling on the current record," and that the circuit court's ruling on Pooh Bah's directed verdict motion was "subject to reservations by all parties of their respective rights to present additional evidence if these motions are not finally dispositive." The order incorporates the circuit court's prior January 18, 2001, memorandum opinion and order, as well as prior rulings it rendered on August 21, 2000, and for the reasons stated in those prior decisions, granted Pooh Bah's motion for directed finding and for judgment against the City. In the May 3 order, the circuit court explicitly "retain[ed] jurisdiction," *inter alia*, "over the remaining trial of these matters, if any of the judgments herein shall be reversed or vacated. "The court's order also stated that "Pooh Bah has reserved its right to present additional evidence in opposition to Counts I-V and in support of its affirmative defenses and amended counterclaims in No. 99 CH 9682,

and in support of its claims in No. 93 CH 4559, if the judgments in this order are not affirmed in a final and non-appealable order."

Thus, the record reflects that the circuit court entered judgment for Pooh Bah against the City on a motion for entry of a directed verdict and not on a final record at the end of trial Pooh Bah was midstream in its defense case and was not finished in attacking the City's *prima facie* case in justification of the coverage ordinance when the circuit court ruled on Pooh Bah's already pending motion for directed verdict. Based upon this procedural posture, the circuit court explicitly reserved the "right" of Pooh Bah to present additional evidence on remand in the event of a reversal and did not limit the scope of such evidence. In its opinion, this court mentions the entry of the May 3, 2001, orders in passing (slip op. at 11), but does so in a general and vague manner, except for specifically noting in footnote 9 of the opinion that one of the agreed orders "reserved to the City the right to present additional evidence regarding the amount of fines that could be imposed by Pooh Bah in the event the City prevailed on the merits." Slip op. at 11 n.9. I question why this court feels compelled to set forth with specificity that the circuit court order provides that the City may present additional evidence with respect to the fines to be levied against Pooh Bah on remand, but remains completely silent with respect to the fact that the order also granted to Pooh Bah "its right to present additional evidence" regarding issues which were cut short by the court as a result of its grant of Pooh Bah's motion for directed verdict. I attach the circuit court's May 3, 2001, "Partial Judgment Order" as an appendix to this dissenting opinion as the best evidence of the intent of the parties and the circuit court with respect to this issue.

In addition, I note that the intermediate scrutiny analysis of the validity of the City's secondary-effects justification in support of the coverage ordinance is *a fact-based* assessment, as the United States Supreme Court has repeatedly noted, particularly in its most recent decisions. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002); see also *R.V.S., L.L.C. v. City of Rockford,* 361 F.3d 402 (7th Cir. 2004). In *Alameda Books*, the Court described the proper analytical framework for this inquiry:

> "We held [in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)] that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest. [Citations.] This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 438-39, 152 L. Ed. 2d at 683, 122 S. Ct. at 1736.

In their opinion, my colleagues do not address this three-part evidentiary procedure set forth by the United

States Supreme Court, which requires: (1) justification for the ordinance by the government; (2) challenge and dispute of the ordinance by the challenger; and (3) rebuttal by the government. Instead, they take Pooh Bah to task for requesting that this court recognize its right – under the *Alameda* decision and the May 3, 2001, circuit court order – to complete presentation of its evidence at trial:

> "The sole reason Pooh Bah seeks to present [additional evidence on the question of whether the ordinance actually creates the secondary effects claimed by the City] is to renew and bolster its contention that the ordinance violates constitutional standards. For purposes of this appeal, however, the constitutionally of the ordinance is no longer subject to dispute. Our holding that the ordinance does not violate the United States or Illinois constitution is conclusive of the issue and shall be binding on the parties and on the circuit court on remand." Slip op. at 48.

I disagree. This court's opinion fails to explain why, since the circuit court judge's directed findings on a half-completed record are now reversed, the rebuttal cases of both the challengers and the government should be cut off, not only despite the fact that the constitutional procedures mandated for intermediate scrutiny review require that both sides have these opportunities, but also despite the fact that the circuit court's May 3, 2001, order explicitly reserved to Pooh Bah this right in light of the procedural posture of the case at the time that order was entered.[1]

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[1] As Pooh Bah states in its petition for rehearing:

"[T]he opinion prematurely makes a 'final' determination of the constitutionality of the coverage ordinance on the fact-sensitive

(Continued on following page)

In addition, this court's opinion reverses a fact-based decision of the trial court and, in doing so, reweighs the sufficiency and credibility of the City's "justification" evidence to conclude that the City has adequately established that the coverage ordinance was enacted to combat secondary effects. As a general matter, it is not for this court, as a court of review, to substitute its judgment for that of the trial court on issues of fact, as the trial court judge is in the best position to observe the conduct and demeanor of the parties and the witnesses. *Best v. Best*, 223 Ill. 2d 342, 350-51 (2006). This court's actions are particularly troubling in this case, in light of the following excerpt from the memorandum opinion and order of the circuit court, written after a parade of witnesses were called by the City in support of its secondary-effects justification: "The court finds the record devoid of any proof of the existence of even potentially harmful secondary effects. Indeed, it finds that the City was successful in merely positing the possibility that those secondary effects could hypothetically exist."

Unless this court can say with 100% certainty that, as a *matter of law*, there is no possible further evidence that may cast any doubt on the City's two main theories of justification – patron-generated crime and outside-generated crime – or

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intermediate scrutiny review-even though the most that can properly be determined on appeal on that review (by reversing the trial judge's findings) is that the City made *a prima facie* case to justify the ordinance. Particularly on the as-applied challenge, the case was not over. But the opinion improperly cuts off the attack on the City's preferred secondary effects justifications, thus barring this litigant from *ever* finishing its constitutional attack on the ordinance." (Emphasis in original)

that might refute those theories, this case should be allowed to play out in the trial court on remand, like any other case where a directed finding is reversed. The court's opinion leads to the conclusion that the majority is unfairly holding Pooh Bah to an unprecedented and heretofore-not-announced standard that mandates a proffer of evidence on appeal to obtain a remand after reversal of a directed finding.

In addition, Pooh Bah also asserts on rehearing that the opinion filed by this court overlooks, as part of its intermediate scrutiny analysis, the issue of multiple, overlapping and cumulative legislative remedies in this case. As the court notes in its opinion, the challenged coverage ordinance was passed by the Chicago city council in 1978. Subsequently, in 1993 the city council passed an anticoncentration adult use zoning ordinance which adopted location and dispersion regulations for adult uses in the city, and which was enacted to combat the same perceived problem as allegedly targeted by the coverage ordinance: the so-called secondary effects of liquor-serving adult-dancing venues.

As early as in its petition for leave to appeal filed with this court, Pooh Bah raised the validity of these overlapping regulations as a central issue for this court's review, and noted that its club complies with the requirements of the later-enacted adult use ordinance. In its petition for leave to appeal, Pooh Bah questioned whether, in the specific factual context of this case, the City must show whether the coverage ordinance has, or will have, some substantial impact on the targeted secondary effects above and beyond that provided by the subsequent adult use zoning ordinance. Pooh Bah made the point that, if this query is answered in the negative, there is a danger that

restrictions on free speech and expression can cumulate, "with the latest legislative 'solution' piled on top of yesterday's solution, and on and on without genuine judicial review of their individual justifications – or lack of justification." The significance of the interplay between these regulatory remedies as applied to Pooh Bah was one of the reasons that this court accepted this appeal for review. *However,* in its opinion, the court has failed to address this issue, which is relevant in determining the validity of the City's secondary-effects justification.

Along these lines, Pooh Bah also asserts that this court improperly overlooked in its opinion that, as a result of the City's 1993 enactment of the adult use zoning ordinance, Pooh Bah's club is legally mandated to be physically isolated from any other adult venues. According to Pooh Bah's rehearing petition, the court's opinion "ignores the industrial, non-residential character (and associated limited pedestrian traffic patterns) of the Club's area," facts which, in Pooh Bah's view, are "especially pertinent to the as-applied challenge, which the court does not take up in its opinion."

In my view, the facts concerning the physical isolation of Pooh Bah's club are relevant to two issues. First is the general "justification" for the coverage ordinance with respect to incidents of crime in the vicinity of the club generated from outside sources. The City and most of the case law relies heavily on this justification. In addition, this argument was supported by the various "studies" from other cities that the City's expert witnesses described in the circuit court. Pooh Bah, however, countered that most or all of that evidence is based on concentrations of adult businesses or concentrations of liquor establishments. If so, then the absence of concentration in this case is a

factor that undermines the relevance of those studies. Indeed, this is one of the obvious disputes in this case that is appropriate for further evidence on remand.

Second, the physical isolation of the club is relevant to Pooh Bah's as-applied challenge to the coverage ordinance based on the later-enacted adult zoning ordinance, which, as stated, mandates physical separation between adult establishments and which, Pooh Bah claims, has solved any crime-in-the-vicinity problem (based upon the absence of crime in the area). Pooh Bah asserts that this state of affairs requires from the City some additional or different justification for the coverage ordinance beyond the usual anticrime justification. It is my view that the coverage ordinance of the 1970s may be archaic and unnecessary by virtue of the City's own superseding adult use zoning legislation. The City's burden of justifying the older coverage ordinance under the immediate scrutiny analysis should include the burden of demonstrating the marginal need for the older law in addition to the anticoncentration efforts in the newer zoning law. These are points which are completely overlooked by the court in its opinion, and which would be appropriate for further consideration.

In a related argument, Pooh Bah asserts in its petition for rehearing that this court engaged in "clear and plain error" in its consideration of the intermediate scrutiny issues by incorrectly citing the legislative history and preambles of the City's 1993 adult use zoning ordinance as if that were the legislative history and original city council intent of the challenged coverage ordinance, which was enacted 15 years earlier. See slip op. at 24-26. I agree. The findings on which this court's opinion relies focus on the City's justification for enacting the *zoning* restrictions, rather than for the earlier-enacted coverage ordinance. As

Pooh Bah states in its rehearing petition, "the opinion erroneously treats the City's announced policies supporting its 1993 adult use *zoning* remedy (which were not addressed to liquor venues) as if it were the original expressed intention for the 1978 'coverage' requirements–which had no preamble or announced intentions other than the Committee Report, which the opinion disregards." (Emphasis in original.)

In sum, with respect to this court's treatment of the intermediate scrutiny issues in this appeal, I agree with Pooh Bah that it is untenable precedent to reserve a directed finding and then not allow the former winner to finish presenting its evidence on remand, especially on an appeal from an injunction hearing without full discovery. As Pooh Bah validly points out in its rehearing petition:

> "Why would any Illinois lawyer now move for (or accept) a directed verdict or finding–which is *now* a waiver of the right to present the rest of his/her case if the appellate courts disagree with the trial judge? When, as here, the reviewing courts reweigh the evidence with nary a mention of the deferential manifest weight or clear error standards, there is a palpable sense of arbitrariness that will constrain Illinois litigants to make an *entire* record – even when the trial judge finds more hearings unnecessary." (Emphases in original.)

The precedent set by this court's refusal to allow completion of evidence on the intermediate scrutiny first amendment issues following the reversal of a directed finding undermines the integrity of the directed-verdict procedure, and strongly discourages Illinois litigants from employing this judicial time-saving device for fear of losing their

rights to complete their record if their directed verdict is upset on appeal. The fact that this litigation has a protracted history should be of no moment in this consideration, and is not a reason to short-circuit our own well-settled laws of civil procedure.

As a final matter, Pooh Bah contends in its petition for rehearing that this court's opinion contains "errors, omissions and distortions of the record" which serve to inject "irrelevant," "misleading," and "consistently one-sided" information into this case. I agree with Pooh Bah that these points merit further consideration by this court.

First, at page 33 of the slip opinion, the court discusses the evidence presented by the City in the circuit court with respect to the historical negative secondary effects caused by strip clubs licensed to sell alcohol in the Rush Street area of Chicago during the late 1970s and early 1980s. Testimony in the circuit court indicated that during that time period, strippers and waitresses associated with those Rush Street establishments accounted for a large number of the prostitution arrests in that geographic area, and, this court states, "[n]egative secondary effects were serious and pervasive." This court then turns to the present state of affairs and observes that, with respect to Pooh Bah's club, "[s]uch widespread effects may not have recurred *yet*" (Emphasis added.) This court also notes in footnote 14 on the same page of the slip opinion that although the City in this litigation had initially alleged that incidents of prostitution occurred at Pooh Bah's club, "it does not appear that any dancer or patron has *yet* been charged with prostitution or prostitution-related offenses." (Emphasis added.)

The insertion of the word "yet" into these statements amounts to an unjustified judicial forecast that, even though the historic negative secondary effects associated with strip clubs selling alcohol have not been proven with respect to Pooh Bah's club, and, even though the City failed to establish that incidents of prostitution occurred at or could be connected to the club, they simply have not "yet" occurred and will likely appear in the future. This is particularly inappropriate in light of the litigation below where the City attempted to prove solicitation and/or prostitution and failed completely in establishing its case. In his memorandum opinion and order, the circuit court judge below – who had the opportunity to assess the demeanor and credibility of the witnesses who testified on behalf of the City – described the failings in the City's evidence as follows:

> "Undercover police officers * * * tried to entrap the dancers in an attempt to show prostitution and solicitation. According to the clear evidence presented at the trial, the dancers were not interested. The police tried using video cameras planted in their neckties – James Bond style – to show violations. That failed too. The simplest thing that could have been done by the City would have been to produce residents who were affected by the existence of [the Club]. None were brought forth. At least five police officers, a minimum of five assistant corporation counsels and the latest in modern technology were used to present a case that was totally devoid of proof."

The circuit court judge further wrote that "the City did not produce any neighbors – either commercial or residential owners or tenants – who complained about the existence of or the effects of [the Club]. No Testimony was offered by

the City that [the Club] operated in a manner which unreasonably interferes with the health, safety, peace, comfort of' convenience of the general public."

Accordingly, the record affirmatively refutes the allegation of the City that there was solicitation and/or prostitution in – or associated with – Pooh Bah's club. It is blatantly improper for this court on review to intimate that it is only a matter of time before the historical negative secondary effects, including prostitution, occur – despite the fact that the record in this case is completely devoid of such evidence. This court unjustly places its imprimatur in a published opinion on the suggestion that Pooh Bah's club has in the past and/or will in the future be connected to these types of illegal and undesirable activities.

In addition, Pooh Bah also states in its petition for rehearing that this court has selectively reached outside the record to inject "facts" into its opinion which are not only "irrelevant, defamatory and consistently one-sided," but also which occurred *subsequent* to the proceedings in the circuit court below, in an effort to support its ruling in favor of the City and against Pooh Bah. According to Pooh Bah's rehearing petition:

> "[T]he Court has expended extraordinary *sua sponte* effort to inject irrelevant and tertiary references to other's criminal conduct and associations, as well as baseless accusations of 'prostitution' to taint the Club and its ownership. This is not only completely unnecessary to the decision in this case, but misrepresents the facts and relationships involved. It is also unfair. Pooh Bah has no opportunity here or on remand (under the current order) to present rebuttal evidence. * * * Such

> guilt by association has no place in a judicial opinion."

I agree.

In its rehearing petition, Pooh Bah points to the information contained within footnotes 2 and 3 of this court's opinion as being particularly egregious. Both of these footnotes contain outside-the-record information which is blatantly unfair to defendants and irrelevant to this court's decision. For example, footnote 2 maligns Joe Pascente – one of four assistant managers at the Club – as the son of a convicted defrauder, and impliedly paints him with that same brush. As far as this record reflects, Joe Pascente has not been convicted of any crime, and is not "associated" with any other criminals. In addition, the statement in the footnote that the Chicago police department "fired [him] for failing to disclose that he was a subject of an FBI investigation into insurance fraud involving his father" is improper. The record below reflects that Joe Pascente denied that he was ever a subject of an FBI investigation, there is no judicial finding on this issue, and there is no evidence in this record – nor any cited in the challenged footnotes – to confirm that he was such a subject. The City's police personnel file (on which the City attorney said that she based her accusation during the hearings in the circuit court) is not contained in this record. Nevertheless, this court's footnote treats that hearsay allegation as a fact in a published opinion, with respect to a person who has not been convicted of any wrongdoing. This is improper and sets a disturbing precedent.

In addition, with respect to Joe's father, Fred Pascente, the record reflects that he was a retired Chicago

police detective who was an employee of the Club, but had no management authority. Footnote 2, however, insinuates that Fred Pascente was running the Club, and that there is an association between the Club and nefarious criminals because Fred Pascente is *now* listed in the Nevada Gaming Commission's "Black Book," I note that this listing occurred *subsequent* to the conclusion of the protracted litigation below, and that this information was drawn by this court from sources outside the record on appeal.

Similar concerns exist with respect to footnote 3 in the opinion. In this footnote, the court has provided a detailed resume of the legal problems faced by Fred Rizzolo which apparently have occurred *subsequent to* his involvement with the Club, and which have been gleaned, once again, from sources outside the record on appeal. The record in this case reflects that in 1995 the Club's owner, Perry Mandera, entered into management and licensing agreements with Rizzolo, who owned a Las Vegas strip club known as the "Crazy Horse Too." Mandera stated that he wanted to license the nationally recognized "Crazy Horse Too" name for his Chicago Club because it would be a name known to Chicago conventioneers and, therefore, work as a benefit to the business. As this court's opinion notes, the Club operated under the "Crazy Horse Too" name until 2003. Footnote 3 of the court's opinion, however, focuses on Rizzolo's legal difficulties in 2006 with respect to the operation of his Las Vegas club, with no indication that any difficulties arose with respect to his association with Mandera's Chicago Club, or that this played any part in the proceedings below. Because the City did not allege criminal infiltration of Pooh Bah's business, Pooh Bah had no reason to rebut such claimed associations in the

circuit court below, as they were first emphasized in this opinion on appeal.

As a court of review, it is our role to examine the record below and review the validity of the judgments below. It is not our role to *supplement* the record on appeal. Will litigants now expect that in every case this court will comb the Internet or other outside-the-record sources of information – whether reliable or not – to gather up-to-the-minute information irrelevant to the disposition of the legal issues in their case on appeal, but prurient enough to include as tantalizing side-pieces of information contained within the footnotes of this court's opinions? After the opinion filed in the matter at bar, they would be justified in so believing.

It is unclear to me why, at the very least, this particular portion of Pooh Bah's petition for rehearing has not generated any type of response from my colleagues in the majority. Do they not agree that such errors, omissions and distortions of the record in this case warrant a correction?

Because I am troubled by the points raised by Pooh Bah in its petition for rehearing, I believe that this matter merits further reflection by this court on rehearing. Accordingly, I respectfully dissent from the denial of rehearing in this cause.

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

CITY OF CHICAGO, an Illinois municipal corporation,
Plaintiff-Counterdefendant,

v.

POOH BAH ENTERPRISES, INC.,
an Illinois corporation, and PERRY MANDERA,
Defendants-Counterplaintiffs.

No. 99 CH 9682

POOH BAH ENTERPRISES, INC., an Illinois corporation; ACE ENTERTAINMENT CO., INC., an Illinois corporation; PERRY MANDERA, Pooh Bah president and Ace Entertainment Co., Inc. president; LISA D. SIMS, CHRISTEN E. HADSALL, and SUSAN L. LJENQUIST, entertainers and dancers; and PETER ABRUZZO, Plaintiffs,

v.

CITY OF CHICAGO, an Illinois municipal corporation; RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago; WINSTON MARDIS, in his official capacity as Director of the Mayor's License Commission; LICENSE APPEAL COMMISSION; WILLIAM D. O'DONAGHUE, Chairman; ALBERT D. McCOY and IRVING J. KOPPEL, Commissioners, Defendants.

No. 93 CH 4559

PARTIAL JUDGMENT ORDER[1]

(May 1, 2001)

These cases are before the court on Pooh Bah's motions for directed findings and for judgment at the conclusion of the City's case-in-chief on the City's Counts I-V in No. 99 CH 9682 and on Pooh Bah's Counts VI and VII in No. 93 CH 4559, and on the parties' stipulation submitting the cases for a ruling on the current record, along with the record on administrative review, subject to reservations by all parties of their respective rights to present additional evidence if these motions are not finally dispositive; and the court, being fully advised in the premises, does now FIND:

1. The City has rested on its following claims and defenses, which are ripe for a ruling on Pooh Bah's motions for directed findings and for judgment:

   (a) Counts I-III of its complaint in No. 99 CH 9682 (seeking injunctive relief);

   (b) the liability issues in Counts IV and V of its complaint in No. 99 CH 9682 (seeking fines); and

   (c) its defense against Pooh Bah's facial constitutional attack on § 4-60-140(d) of the Chicago Municipal Code;

2. The court reaffirms the rulings set forth in its Memorandum Opinion and Order issued January 18, 2001 ("January 18th Memorandum Opinion") and in

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[1] In this order, "City" refers to plaintiff in No. 99 CH 9682 and, collectively, to defendants in No. 93 CH 4559; and "Pooh Bah" refers, collectively, to defendants in No. 99 CH 9682 and to plaintiffs in No. 93 CH 4559.

the transcript of proceedings in this case dated August 21, 2000 ("August 21st Rulings"); and

3. Appellate review of this court's decision, as set forth in the January 18th Memorandum Opinion and the August 21st Rulings, will expedite the ultimate resolution of this matter and conserve judicial resources;

WHEREFORE, IT IS HEREBY ORDERED:

1. For the reasons stated in the January 18th Memorandum Opinion and the August 21st Rulings, Pooh Bah's motions for directed findings and for judgment are granted, and therefore:

(a) in case No. 99 CH 9682, judgment is entered for Pooh Bah and against the City on Counts I-V of the complaint; and

(b) in case No. 93 CH 4559, judgment is entered for Pooh Bah and against the City on Counts VI and VII, and the order of the Chicago License Appeal Commission in No. 93 LA 11, affirming the order of revocation entered by the Mayor's License Commission in No. 93 LR 32, is reversed; charges 1-22 in No. 93 LR 32 are dismissed; and the revocation of Pooh Bah's City licenses is vacated and set aside;

2. The January 18th Memorandum Opinion and the August 21st Rulings are incorporated into and made a part of this order;

3. The court retains jurisdiction:

(a) in No. 99 CH 9682, over Pooh Bah's pending amended counterclaims and the City's affirmative defenses thereto;

(b) in No. 93 CH 4559, over Pooh Bah's remaining claims and the City's affirmative defenses thereto;

(c) over the remaining trial of these matters, if any of the judgments herein shall be reversed or vacated, for which purpose:

(i) the City has reserved its right to present additional evidence on the amount of the fines to be assessed on Counts IV and V in 99 CH 9682; and

(ii) Pooh Bah has reserved its right to present additional evidence in opposition to Counts I-V and in support of its affirmative defenses and amended counterclaims in No. 99 CH 9682, and in support of its claims in No. 93 CH 4559, if the judgments in this order are not affirmed in a final and non-appealable order;

4. All proceedings in these two cases shall be stayed pending a final order on the appeal from this order;

5. There is no just reason for delaying enforcement or appeal of the judgments in this order; and

6. This order shall be entered in both No. 99 CH 9682 and No. 93 CH 4559.

ENTER:

Judge AARON JAFFE

AGREED

/s/ David A. Epstein
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APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SECOND DIVISION
SEPTEMBER 28, 2004

Nos. 1-01-0592; 1-01-1932 (Cons.)

CITY OF CHICAGO, Plaintiff-Appellant, v. POOH BAH ENTERPRISES, INC., and PERRY MANDERA, Defendants-Appellees.	) Appeal from the) Circuit Court of Cook) County)) No. 99 CH 9682)) Honorable) Aaron Jaffe,) Judge Presiding.
POOH BAH ENTERPRISES, INC., et al., Plaintiffs-Appellees, v. CITY OF CHICAGO, Defendant-Appellant.	) Appeal from the) Circuit Court of Cook) County)) No. 93 CH 4559)) Honorable) Aaron Jaffe,) Judge Presiding.

ORDER

Pooh Bah Enterprises Inc. (Pooh Bah) owns and operates an adult entertainment establishment (the Club), which has been alternatively called Thee Doll House and Crazy Horse Too. Perry Mandera is the current president of Pooh Bah.

Pooh Bah holds a Chicago liquor license entitling the Club to serve alcoholic beverages. Section 4-60-140(d) of the Municipal Code of Chicago prohibits an establishment holding a liquor license from permitting live entertainers

to expose certain parts of their bodies. Municipal Code of Chicago, Ill. §4-60-140(d) (1999) (the Ordinance). Alleged violations of this section are the basis for both underlying actions in this consolidated appeal.

The first underlying action is a 1993 administrative action before the Liquor Licensing Control Commission (LLCC). The second is a civil action filed by the City of Chicago (the City) in the circuit court in 1999 seeking injunctive relief under the public nuisance doctrine.

In the 1993 administrative action, the LLCC revoked Pooh Bah's liquor license because it found the dancers at the Club exposed their buttocks and breasts in violation of section 4-60-140(d) of the Ordinance. The License Appeal Commission (LAC) affirmed the revocation of the liquor license. Pooh Bah sought judicial review of the revocation in the Circuit Court.

The City's public nuisance suit was filed in 1999, while review of the LLCC's revocation of Pooh Bah's liquor license was pending in the circuit court. Both cases were consolidated in front of Judge Jaffe in the chancery division. Judge Jaffe found the Ordinance unconstitutional, denied injunctive relief, and reversed the LLCC's order revoking Pooh Bah's liquor license.

The City's appeal from the judgment setting aside the liquor license revocation is number 01-1932 and the city's appeal from the order in the nuisance case is number 01-592. These two appeals have been consolidated for review.

On appeal, the issues presented by the parties are: 1) whether section 4-60-140(d) is unconstitutional in that it impermissibly restricts freedom of expression, is overbroad, or is impermissibly vague; 2) whether the circuit

court erred in denying injunctive relief against dancing at the Club; and 3) whether the LLCC's administrative decision revoking Pooh Bah's liquor licenses should have been upheld.

BACKGROUND

The Club serves alcohol and provides adult entertainment where dancers remove their clothes to music during either a "stage dance" or a "table dance." A stage dance is performed on a raised platform located behind the bar that all patrons are able to view. A table dance is performed for an individual paying customer at the customer's table. Once disrobed, the shape and form of the dancer's breasts are exposed and portions of the breast are typically covered with several layers of a latex substance applied over a pancake makeup base. In addition, the dancers typically wear thong bottoms, also known as "G-strings" or "T-bars." The basis for both the 1993 and 1999 cases is whether the latex over the breasts and the G-string bottoms substantially comply with section 4-60-140(d), which governs the attire of live entertainers in establishments licensed to serve alcohol in the city of Chicago.

In 1993, the City initiated proceedings against Pooh Bah to revoke Pooh Bah's retail liquor license for the Club. The notice charged that during several days in February 1993, Pooh Bah through its agents, permitted employees or entertainers to engage in performances on the Club's premises in violation of section 4-60-140(d). The LLCC conducted a four-day hearing.

LLCC Administrative Proceeding

At the evidentiary hearing before the LLCC, the City called Chicago Police Officer Thomas Bohling, who testified about his observations at the Club. Officer Bohling testified that on February 22, 1993, while acting undercover; he visited the Club to investigate whether the Club was violating any state or local statutes. Officer Bohling testified that the dancers wore various attire including thongs and bikinis and some were topless with latex on their breasts. Officer Bohling observed different dancers perform, each to three songs. During the first song the dancer wore an evening dress, and during the second song the dancer wore a two-piece outfit. During the third song, the dancer was topless with a latex covering on her breasts and wore a G-string, shoes and sometimes a garter. Officer Bohling observed dancers Ashley, Devon, Emanuel, Alexis, and Malibu, who all wore thongs that covered their pubic areas. Officer Bohling also testified that the dancers' G-strings had a waistband with a part that went down through the cleft of their buttocks. Officer Bohling testified he could see the cheeks of their buttocks up to the cleft. He observed that the dancers were topless except for a latex makeup substance applied to the front part of the breast. Officer Bohling testified that the sides of the breast and a portion below the areola were not covered by the latex. Officer Bohling stated that he could see through the latex and could observe the difference in the color of the "fleshy part of the breast and the areola portion."

Officer Bohling testified that he returned to the Club on February 23 and 24, 1993. He observed the same type of activities that he had seen during his previous visit. officer Bohling testified that the dancers' buttocks were

not covered by the G-string, and the sides and lower portion of their breasts were not covered by the latex. Officer Bohling testified that he could see through the latex and differentiate between the fleshy part of the breast and the areola.

Sandra Lee Conant, an employee at the Club, testified that her job duties included providing comfort and counseling to the dancers. Conant testified that during part of the performance, the dancers wore a G-string, which she described as "a small kind of panty," that allows the "cheeks on either side of the buttock" to be exposed.

Testimony was provided by dancers from the Club. Belinda Williamson testified that while she danced the "cheeks of [her] buttock" were "fully and completely exposed." Christine Marie Rambo (Devon) testified that a portion of her buttocks was not covered by the G-string. Melissa Candelaria (Malibu) and Cynthia Sudheimer (Christy) each testified about the process by which the latex is applied to the breasts before the performances. Malibu demonstrated the process on a balloon.

After the hearing, the LLCC found Officer Bohling's testimony to be credible and reliable. The LLCC also found that a number of the dancers identified by Officer Bohling wore G-strings that exposed their buttocks to public view, and that employees of the Club, including the licensee himself, were present during the performances and did not attempt to stop the dancers or require them to wear additional clothing. The LLCC revoked Pooh Bah's liquor license for violations of section 4-60-140(d).

In reaching this decision, the LLCC used two different definitions for "buttocks" and found that under either definition, exposure of the cheeks of the buttocks was

sufficient to amount to exposure of buttocks as the term was used in section 4-60-140(d). The LLCC specifically found that the use of a G-string in this case falls far short of a reasonable attempt to comply with the Ordinance. Additionally, the LLCC found the use of latex, applied in a triangular fashion to the breast, exposing the sides of the breast and the area below the areola, violated section 4-60-140(d). The LLCC revoked Pooh Bah's liquor license for those violations and the LAC affirmed the revocation. Pooh Bah appealed the revocation of its liquor license to the circuit court for administrative review.

On May 3, 2001, the circuit court ruled that section 4-60-140(d) was unconstitutional and issued an order entering judgment in favor of Pooh Bah and reversing the LAC's decision revoking Pooh Bah's liquor license.

Nuisance Action

In 1999, while administrative review of the 1993 case was pending in the circuit court, the City filed a complaint against Pooh Bah and Mandera claiming that the operation of the Club was a nuisance due to additional alleged violations of section 4-60-140(d). The City sought an injunction. This new case was consolidated with the 1993 LLCC case and both were before Judge Jaffe in the circuit court.

The circuit court conducted an evidentiary hearing on the 1999 nuisance case. This hearing was independent of the LLCC's findings in the 1993 case, and although the violations were factually similar, the instances at issue in the 1999 hearing were separate from the instances of alleged violations in 1993. At the hearing, the City called four police officers (Officers White, Sokniewicz, Ramirez,

and Marques) to testify about their observations at the Club. The City also called a demonstrative witness to explain the application of latex to the breasts.

Officer Ralph White testified that in April and May 1999, he and a partner, Officer Brian Sokniewicz, acting undercover, visited the Club on a number of occasions to investigate prostitution and liquor license violations. Officer White testified that after several songs, the dancers removed their clothing, revealing thong bikinis on the lower portion of their bodies. He testified that their buttocks were completely exposed and that nothing was covering the dancers' breasts except latex, which "was just around the nipple and areola."

Officer Sokniewicz testified that the dancers at the Club wore only shoes and a G-string, and their buttocks as well as the sides and lower portion of their breasts were exposed. Officer Sokniewicz testified that at times he could see through the latex and observe the variation in the color of the areolae and the breasts. Officer Sokniewicz testimony mirrored that of Officer White. However, Officer Sokniewicz also testified about a table dance during which he could see the dancer's pubic hair. He testified that the dancer was wearing pantyhose of a translucent material, and he had "a clear view of what was underneath." officer Sokniewicz also described a table dance performed by Danielle during which she was wearing only a G-string. Officer Sokniewicz testified that Danielle placed her thumbs inside the waistband of the thong and began to slide the material forward and down, pulling the G-string away from her body and exposing her pubic region to Officer Sokniewicz. Officer Sokniewicz testified that on another occasion, Samantha performed a table dance during which she stood on one leg in front of Officer

Sokniewicz and raised the other leg up toward the ceiling. Officer Sokniewicz testified that he could see "she had no pubic hair, and protruding from the thong between her legs the labia was exposed."

Officers Joseph Ramirez and Donald Marques visited the Club four times in February 2000. On each occasion, Officer Ramirez videotaped the dancers using a hidden camera. During one visit, the officers were approached by a dancer named Maria, who danced for them a number of times. Officer Ramirez testified that Maria had a thin layer of latex over the areolae of her breasts, and he could see the areolae through the latex.

Chicago Police Officer Roger O'Brien testified about the law enforcement history in the 18th District. He explained that the 18th District covers the Rush Street area in Chicago. He testified that there used to be approximately 12 or 13 strip clubs that served alcohol around Rush and State Streets. Officer O'Brien testified that during the late 1970's and mid-1980's, prostitutes could be found on every corner, and approximately 80% of the prostitution-related arrests in the 18th District had been made in the Rush Street area. During that period, strippers and waitresses at the strip clubs frequently engaged in prostitution. Officer O'Brien testified that there has been an 80% decrease in prostitution in that area since the strip clubs selling alcohol have been shut down. In his opinion, the decline of prostitution was attributable to the closure of the strip clubs.

Thomas Smith, Assistant Commissioner for zoning in the City's Department of Planning and Development, testified that, in his expert opinion, there is a relationship between the establishment of adult businesses and an

increase in crime. Assistant Commissioner Smith relied on his experience as an urban planner and on a number of studies conducted by other local governments to formulate his opinion. He testified about several studies, including a study done in the city of Phoenix. He testified that the Phoenix study showed that the incidents of sex crimes were 500 times greater and property crimes 43% greater. in areas with adult businesses, compared to areas with no adult businesses. He also testified about a study showing a 77% increase in sex crimes in areas with adult businesses in the city of Indianapolis; a study from the city of Minneapolis showing that adult businesses have a significant impact on crime rates; a study in Minnesota, consisting of a summary of various other studies showing a relationship between adult businesses and crime; and a report from Los Angeles, showing a greater proportion of increase in sex crimes in areas with a concentration of adult businesses compared to other areas. Assistant Commissioner Smith testified that while adult businesses may not themselves cause crime, they have a relationship with crime.

Dr. Allen Kodish, a practicing psychiatrist and a faculty member at the University of Chicago, testified about the effects of combining alcohol with sexual stimulation. He testified that alcohol intake facilitates sexual and aggressive impulses, and impairs social judgment. When combined with sexual stimulation, alcohol produces an effect "associated with an increase in violent sexual acting out, acts of criminal behavior." Dr. Kodish testified that drinking alcohol while viewing naked or nearly naked dancers can lead a person to act on various impulses, such as touching, screaming, and engaging in fights or risky behavior. Dr. Kodish testified that not everyone reacts that

way, but the combination of alcohol and sexual stimulation increases the chances that such events could occur. Dr. Kodish discussed a study entitled "The Effects of Male Social Drinking on Fantasy," which showed that increased alcohol in men is associated with increased sexual and aggressive thoughts.

Dr. Wesley Skogan, a full professor of political science at Northwestern University and a member of the research faculty at the Institute for Policy Research at Northwestern University, testified that research shows that establishments that serve alcohol attract a significant amount of additional crime. He explained that such establishments provide an opportunity for crime by bringing the potential victim and criminal together. Dr. Skogan testified that the victims become more vulnerable because of alcohol's disorienting effects, which creates an attractive situation for the potential offender. Dr. Skogan discussed a number of studies and articles showing a relationship between alcohol establishments and crime, showing that establishments that serve or sell alcohol exacerbate crime.

Pooh Bah presented a number of witnesses. Pooh Bah called several dancers and managers to testify about the operation of the Club, the attire, and specifically the application of latex to the dancers' breasts. Perry Mandera, the current president and sole owner of Pooh Bah, who had purchased the Club in 1993, conceded that he has never seen a G-string that completely covered the buttocks of a dancer at the Club. However, Mandera testified that the latex covering used by the dancers covers the entire areola, as well as the nipple of the breast and goes beyond.

Pierre DeVise, a self-employed consultant, testified that he was not aware of any studies showing a relationship

between liquor establishments featuring semi-naked dancers and crime. Devise opined that there is no cause and effect relationship between liquor establishments featuring partially clad dancers and crime. Devise testified that the study from Minneapolis, which Assistant Commissioner Smith previously testified about, was one of the best studies he had seen.

Peter Girandola, an assistant professor of psychology at the University of Kentucky, opined that there is no direct, positive relationship between viewing sexual stimuli and sexual "acting out behavior."

Rolf Campbell, a planning and zoning consultant hired by Pooh Bah, testified that in his opinion the dancing at the Club did not have a "negative impact on the orderly development of the immediately surrounding properties."

Because the 1999 hearing was independent of the administrative review of the 1993 case, the circuit court made its own findings of fact regarding the attire of the dancers at the Club. The circuit court found that the testimony of the City's demonstrative witness regarding the quantity and consistency of the make-up base and the latex differed with the testimony of the dancers and Pooh Bah's make-up artist as to the normal, everyday practices of the dancers at the Club. The circuit court also found that the Club's management inspected the dancers' makeup coverage several times an evening. Furthermore, the circuit court noted the "marked differences between the courtroom and [the Club] in terms of the lighting conditions and the atmosphere."

Taking all of this into account, the circuit court found that the evidence presented at the 1999 hearing did not

establish that the dancers' breasts were not covered in the manner required by the Ordinance (*i.e.*, they were sufficiently covered to satisfy the Ordinance). However, while the circuit court found that the dancers' breast coverage complied with the statute, the court did find, based on the pictures, video, and testimony of the officers and dancers alike, that the dancers' buttocks were exposed. Despite finding that the dancers' buttocks were exposed, the circuit court nevertheless found no public nuisance because the dancers' attire was not significantly different than if the dancers were wearing a string bikini on the lakefront of Chicago. Additionally, the circuit court noted that the term "buttocks" was not sufficiently defined in the statute.

Having made these factual findings, the court then proceeded to rule on the issues before it. The circuit court determined there were only two material issues: 1) whether Pooh Bah's operation of the Club created a public nuisance that should be enjoined by the court pursuant to its equitable powers; and 2) whether §4-60-140, titled "Prohibited Activities" is constitutional within the first and fourteenth amendments of the U.S. Constitution and article I, section 4 of the Illinois Constitution.

The circuit court ruled that section 4-60-140(d) was unconstitutional. On that basis, the court entered a judgment setting aside the LLCC's order revoking Pooh Bah's liquor license and denied the City injunctive relief in the nuisance case. Notably, because the court found section 4-60-140(d) unconstitutional, it never addressed the merits of the LLCC decision to determine whether the LLCC was correct in finding the facts presented showed a violation of the Ordinance, or whether the appropriate response to the violation was to revoke Pooh Bah's liquor license.

ANALYSIS

On appeal, the issues presented for review are: (1) whether section 4-60-140(d) is unconstitutional in that it impermissibly restricts freedom of expression, is overbroad, or is impermissibly vague; (2) whether the circuit court erred in denying injunctive relief against the Club in the nuisance. action; and (3) whether the LLCC's administrative decision revoking Pooh Bah's liquor license should have been upheld.

The City requests that the circuit court's orders denying injunctive relief in the nuisance case and setting aside the revocation of Pooh Bah's liquor license be reversed. The City claims that the circuit court applied an incorrect test, which required the City to show that each establishment subject to the Ordinance has generated adverse secondary effects. The City contends that applying the proper standard of review, section 4-60-140(d) withstands constitutional scrutiny. The City argues that the circuit court also erred in holding the Ordinance overbroad and vague. Thus, the city asserts that because the Ordinance is constitutional, the circuit court's rulings denying injunctive relief and reversing the revocation of Pooh Bah's liquor license were improper.

I. Constitutionality of Section 4-60-140(d)

In the circuit court, Pooh Bah argued: (1) the Ordinance is a content-based restriction on erotic expression protected by the first amendment; (2) the Ordinance is unconstitutionally vague in its definition of terms; and (3) the Ordinance is unconstitutionally overbroad in that it bans performances containing expressive nudity only where alcohol is sold. The circuit court agreed and found

the Ordinance unconstitutional. The circuit court also found that section 4-60-140(d) violates article I, section 4 of the Illinois Constitution.

Generally, the factual determinations of the lower court will not be reversed unless they are against the manifest weight of the evidence. *Gold v. Ziff Communications Co.,* 322 Ill. App. 3d 32, 48, 748 N.E.2d 198 (2001). While the factual determinations of lower courts are reviewed for whether they are against the manifest weight of the evidence, the statutory interpretation of the language in section 4-60-140(d) is a question of law and is reviewed *de novo. Caveney v. Bower,* 207 Ill. 2d 82, 88, 797 N.E.2d 596 (2003). Decisions finding a statute or ordinance unconstitutional are reviewed *de novo. In re R.C.;* 195 Ill. 2d 291, 296, 745 N.E.2d 1233 (2001); *Russell v. Department of Natural Resources,* 183 Ill. 2d 434, 441, 701 N.E.2d 1056 (1998). It is our duty to construe acts of the legislature so as to affirm their constitutionality and validity if we can reasonably do so. *In re R.C.,* 195 Ill. 2d at 296. It is well settled that all statutes and ordinances are presumed to be constitutional, and the party challenging the constitutionality of a statute bears the burden of rebutting this presumption and clearly establishing a constitutional violation. *In re R.C.,* 195 Ill. 2d at 296; *Russell,* 183 Ill. 2d at 441.

Section 4-60-140(d) of the Chicago Municipal Code, titled "Prohibited activities" prohibits holders of a liquor license from allowing dancers who perform on the licensed premise to expose certain private parts of their bodies:

> "(d) No person licensed under this chapter shall permit any employee, entertainer or patron to engage in any live act, demonstration, dance or

exhibition on the licensed premises which exposes to public view:

(1) His or her genitals, pubic hair, buttocks, perineum and anal region or pubic hair region; or

(2) Any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or

(3) Any portion of the female breast at or below the areola thereof.

For purposes of this section, any of the items described in subsections (d)(1) through (d)(3) shall be considered exposed to public view if it is uncovered or is less than completely and opaquely covered." Municipal Code of Chicago, Ill. §4-60-140(d) (1999).

A. United States Constitution

In its analysis, the circuit court determined that the Ordinance in this case targets only certain types of entertainment in certain types of venues; and therefore, was subject to strict scrutiny. The court then concluded that the Ordinance could not be justified as a means of combating the secondary effects of establishments that offer both liquor and nude dancing because the City had not done anything more than "merely positing that those secondary effects could hypothetically exist." Pooh Bah argues that the Ordinance is a content-based restriction on erotic expression, and is subject to strict scrutiny analysis. The City contends that the Ordinance is not aimed at the content of speech, but rather is a regulation of time, place,

and manner in addressing the adverse secondary effects that result from combining alcohol with nudity.

The first amendment provides, in part, "Congress shall make no law * * * abridging the freedom of speech * * *." U.S. Const., amend. I. The first amendment's free speech clause has been held by the United States Supreme Court to apply to the states through the fourteenth amendment's due process clause. *Gitlow v. New York,* 268 U.S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625 (1925); *DiMa Corp. v. Town of Hallie,* 185 F.3d 823, 826 (7th Cir. 1999).

Nude or semi-nude dancing is expressive conduct that falls within the outer ambit of the first amendment's protection. *City of Erie v. Pan's A.M.,* 529 U.S. 277, 289, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000); *G.M. Enterprises, Inc. v. Town of St. Joseph,* 350 F.3d 631, 636 (7th Cir. 2003). Even though nude dancing falls within the first amendment's protection, "[t]he impairment of First Amendment values is slight to the point of being risible, since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value and is anyway not suppressed * * *." *Blue Canary Corp. v. City of Milwaukee,* 251 F.3d 1121, 1124 (7th Cir. 2001), see also *Baps,* 529 U.S. at 294 ("even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.")

The Seventh Circuit has directly dealt with the issue now before this court. See *Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702 (7th Cir. 2003) (analyzing whether

a municipality may restrict the sale or consumption of alcohol at adult entertainment establishments without violating the first amendment). Under Supreme Court precedent, adult entertainment zoning ordinances are currently evaluated as time, place, and manner regulations. *Ben's Bar,* 316 F.3d at 713; *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 434, 152 L. Sd. 2d 670, 122 S. et. 1728 (2002); *City of Renton v. Playtime Theaters, Inc.,* 475 U.S. 41, 46-47, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). However, as was the issue in *Ben's Bar,* the ordinance at issue is not a zoning ordinance or a public indecency statute. Rather, we must determine the constitutionality of an adult entertainment liquor regulation. See *Ben's Bar,* 316 F.3d at 714, The Seventh Circuit, in *Ben's Bar,* provided guidance on the proper test to be used when evaluating the constitutionality of an adult entertainment regulation:

> "[A] liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if: (1) the State is regulating pursuant to a legitimate governmental power, [citation]; (2) the regulation does not completely prohibit adult entertainment, [citation]; (3) the regulation is aimed. not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, [citation]; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, [citations]; or alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest [citation]." *Ben's Bar,* 316 F.3d at 722.

Applying the foregoing analysis, we conclude that the Ordinance at issue here does not violate the first and fourteenth amendments. First, the City's "regulation of alcohol sales and consumption in 'inappropriate locations' is clearly within its general police powers. [*44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 515, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996); *California v. LaRue,* 409 U.S. 109, 114, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972)]." *Ben's Bar,* 316 F.3d at 722. Therefore, because the City enacted the Ordinance pursuant to a legitimate governmental power, the first prong of the foregoing test is satisfied.

The second and third prongs of the foregoing test concern the level of scrutiny that must be applied to the Ordinance. *Ben's Bar,* 316 F.3d at 723. The purpose of the regulation determines the level of first amendment scrutiny a court uses to determine whether the regulation of adult entertainment is constitutional. *Ben's Bar,* 316 F.3d at 723. It the regulation was enacted to restrict certain viewpoints or modes of expression, it is presumptively invalid and therefore, the City would have to meet the higher standard of review of strict scrutiny. *Ben's Bar,* 316 F.3d at 723. If, on the other hand, the regulation was adopted for purposes unrelated to the suppression of expression, such as to regulate non expressive conduct, or the time, place, and manner of expressive conduct, a court must apply a less demanding intermediate scrutiny. *Ben's Bar*, 316 F.3d at 723. The United States Supreme Court has held that regulations of adult entertainment receive intermediate scrutiny if they are designed not to suppress the "content" of erotic expression, but rather to address the negative secondary effects caused by such expression. *Alameda Books,* 535 U.S. at 440.

The Ordinance in the instant case regulates semi-nude dancing in that it prohibits holders of a City liquor license from allowing dancers who perform on the licensed premises to expose certain parts of their bodies. However, the Ordinance does not prohibit the sale of liquor if the dancers cover all the "anatomical areas" specified in the Ordinance. Furthermore, the Ordinance does not prohibit semi-nude or nude dancing outright. Regardless, Pooh Bah argues that the Ordinance regulates the constitutionally protected activity of adult entertainment.

In *Ben's Bar,* an ordinance prohibiting sexually oriented businesses from serving alcohol during a dancer's performance was upheld because it did not restrict erotic expression, but merely restricted the serving of alcohol. The statute did not completely prohibit the dancers from conveying an erotic message, rather it merely prohibited alcohol from being sold or consumed on the premises of adult entertainment establishments. *Ben's Bar*, 316 F.3d at 723. The village in that case enacted the ordinance because it believed there was convincing documented evidence that sexually oriented businesses have negative effects on both the existing businesses around them as well as the surrounding areas, which caused increased crime and the downgrading of property values. *Ben's Bar,* 316 F.3d at 723. The court found that the predominate concerns motivating the ordinance were the secondary effects of adult entertainment, not the content of the speech; therefore, the Seventh Circuit determined the ordinance was properly analyzed as a content-based time, place, and manner restriction, subject to intermediate scrutiny. *Ben's Bar,* 316 F.3d at 724.

The Ordinance in this case is similar to the one in *Ben's* Bar, in that it does not prohibit expressive conduct.

Rather, this Ordinance bars the sale of liquor in adult entertainment facilities when the clothing worn by the dancers does not comply with the requirements of the Ordinance. Also, like the Village in *Ben's Bar,* the City in the instant case was motivated by the desire to combat potentially harmful secondary effects created when adult entertainment is combined with alcohol.

Because the Ordinance at issue does not facially interfere with the conveyance of an erotic message, and because the City's primary concern was harmful secondary effects, this Ordinance, like the ordinance in *Ben's Bar,* should be subject to intermediate scrutiny. Therefore, we must determine whether the Ordinance is designed to serve a substantial government interest, is narrowly tailored, and does not unreasonably limit alternative avenues of communication, or, alternatively, furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. See *Ben's Bar,* 316 F.3d at 724. "[I]n order to justify a content-based time, place, and manner restriction or content-based regulation of expressive conduct, a municipality must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects [i.e., is designed to serve; or furthers, a substantial or important governmental interest], while leaving the quantity and accessibility of speech substantially intact [i.e., that the regulation is narrowly tailored and does not unreasonably limit alternative avenues of communication, or, alternatively, that the restriction on expressive conduct is no greater than is essential in furtherance of that interest]." *Ben's Bar,* 316 F.3d at 725.

In order to meet these requirements, the rationale behind the Ordinance must be that it will suppress secondary effects, not speech. To meet this requirement, the village, in *Ben's Bar,* relied on numerous judicial decisions, studies, and reported findings from different cities and professional surveys to support its conclusion that adult entertainment produces adverse secondary effects. The Seventh circuit noted that the first amendment does not require a city to conduct any studies or produce evidence independent of that already generated by other cities, as long as the city reasonably believes that the evidence is relevant to the problems the city wishes to address. *Ben's Bar,* 316 F.3d at 725, citing *Alameda Books,* 535 U.S. at 451; *Renton,* 475 U.S. at 51-52; *Barnes v. Glen Theater, Inc.,* 501 U.S. 560, 583-84, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991). The Seventh Circuit found it entirely reasonable for the village to conclude that barroom nude dancing was likely to produce adverse secondary effects on the local level, even absent specific studies on the matter. *Ben's Bar,* 316 F.3d at 726. Furthermore, the Supreme Court has noted, "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *New York State Liquor Authority v. Vellanca,* 452 U.S. 714, 718, 69 L. Ed. 2d 357, 101 S. Ct. 2599 (1981). Also, the Supreme Court has explicitly held that a State's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one." *LaRue,* 409 U.S. at 118. Furthermore, the Seventh Circuit has noted that, "(liquor and sex are an explosive combination." *Blue Canary,* 251 F.3d at 1124.

In the instant case, the circuit court recognized that the City could enact ordinances to combat the secondary

effects of nude establishments that serve liquor. Nevertheless, the court found "the City has not even come close to demonstrating the existence of these effects," and had been "successful in merely positing the possibility that those secondary effects could hypothetically exist." Contrary to the circuit court's finding that the City had to show results from a specific study around the vicinity of the Club, the Seventh Circuit has noted that the first amendment does not require a city to conduct any studies or produce evidence independent of that already generated by other cities, as long as the city reasonably believes that the evidence is relevant to the problem the city wishes to address. *Ben's Bar,* 316 F.3d at 725, citing *Alameda Books,* 535 U.S. at 451; *Renton,* 475 U.S. at 51-52; *Barnes;* 501 U.S. at 584. As discussed above, the Supreme Court and the Seventh Circuit have both recognized a relationship between nudity and alcohol. See *Bellanca,* 425 U.S. at 718 ("[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior."); *LaRue,* 409 U.S. at 118 ("certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one."); *Blue Canary,* 251 F.3d at 1124 ("[l]iquor and sex are an explosive combination."). Furthermore, the City presented testimony that referred to findings in other cities as a basis for its enactment of the Ordinance. These studies demonstrated adverse secondary effects resulting from the combination of alcohol and nudity. Thomas Smith testified that in his expert opinion there is a relationship between the establishment of adult businesses and an increase in crime. Dr. Kodish testified that alcohol intake facilitates sexual and aggressive impulses and impairs social judgment. Dr. Skogan testified about studies showing that establishments that serve

alcohol attract a significant amount of additional crime. Therefore, it was entirely reasonable and rational for the City to conclude that combining alcohol with nudity produces adverse secondary effects at the local level, even in the absence of specific studies on the matter. See *LaRue,* 409 U.S. at 118. For these reasons, we conclude that the evidentiary record supports the City's proffered rational [sic] for the Ordinance.

Furthermore, the weight of authority strongly favors the City's contention that the Ordinance is constitutional. See *Blue Canary,* 251 F.3d 1121; *Ben's Bar,* 316 F.3d 702; *G.M. Enterprises,* 350 F.3d 631; *Cheetah Enterprises, Inc. v. Lake County,* 22 Ill. App. 3d 306, 317 N.E.2d 129 (1974). In *Cheetah Enterprises,* 22 Ill. App. 3d 306, this court upheld an ordinance prohibiting establishments holding liquor licenses from permitting either total or partial nudity. This court recognized a municipality's need to impose restrictions on establishments that offer both liquor and nudity. *Cheetah Enterprises,* 22 Ill. App. 3d at 313. Similarly, in *Blue Canary,* 251 F.3d 1121, the Seventh Circuit upheld the denial of a liquor license to a club whose dancers performed in pasties and bikini bottoms.

In *G.M. Enterprises,* 350 F.3d 631, an ordinance sought to prohibit the consumption of alcohol by patrons during the dancers' performances. The ordinance only impacted nude dancing, but did not impose an outright ban nude dancing. *G.M. Enterprises,* 350 F.3d at 638. Under the ordinance, if the club allowed nude dancing then no liquor could be sold and the dancer had to be on a stage and a certain distance away from the patrons. *G.M. Enterprises,* 350 F.3d at 635. However, if the dancers covered the specified areas (with pasties and a G-string) during performances, neither of the restrictions applied.

G.M. Enterprises, 350 F.3d at 638. The Seventh Circuit held that the first amendment does not entitle either dancers or patrons to have alcohol available during a presentation of nude or semi-nude dancing. *G.M. Enterprises,* 350 F.3d at 636.

The Ordinance in the instant case is similar to the Ordinance reviewed in *Ben's Bar* and *G.M. Enterprises.* As it those cases, the instant Ordinance does not restrict erotic expression, but merely restricts the serving of alcohol. Furthermore, as the Seventh Circuit has held, the "First Amendment does not entitle [the Club], its dancers, or its patrons, to have alcohol available during a 'presentation' of nude or semi-nude dancing." *Ben's Bar,* 316 F.3d at 726.

Finally, we find that the Ordinance is narrowly tailored because it does not impose any restrictions on a dancer's ability to convey an erotic message, but merely prohibits the Club from serving alcoholic beverages. As the Seventh Circuit found in *Ben's Bar,* this is not a restriction on erotic expression, but a prohibition of non-expressive conduct. The "First Amendment does not entitle [the Club], its dancers, or its patrons, to have alcohol available during a 'presentation' of nude or semi-nude dancing." *Ben's Bar,* 316 F.3d at 726. The Ordinance does not violate the first amendment because the liquor prohibition is no greater than is essential to combat the secondary effects resulting from combining semi-nude dancing and alcohol consumption.[4] See *Ben's Bar,* 316 F.3d at 727. Based on all of the above, we find the Ordinance at issue constitutional.

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[4] Pooh Bah has conceded that the record in this case undisputedly established that the Club is now and for the last nine years has been

(Continued on following page)

Pooh Bah also argues that the Ordinance is unconstitutionally overbroad because it bans performances containing expressive nudity only where alcohol is sold. Pooh Bah contends that the ordinance is overbroad because it would apply to legitimate theater venues. The circuit court agreed and found the Ordinance overbroad because it could reach legitimate theater or serious films if shown at a licensed establishment. For a law to be invalidated as overbroad, "its overbreadth 'must not only be real, but substantial as well.'" *People v. Anderson,* 148 Ill. 2d 15, 26, 591 N.E.2d 461 (1992), quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973).

In *LaRue,* the Supreme Court stressed that the "state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink." *LaRue,* 409 U.S. at 114. Similarly, the instant Ordinance deals with the licensing of strip clubs to sell liquor. In the instant case, no evidence was presented to demonstrate any danger to third parties. As the City noted, it does not issue liquor licenses covering the stage and seating areas at legitimate theaters because alcohol in theaters is strictly confined to the lobby area and to only one hour before the performance (Municipal Code of Chicago, Ill. § 4-60-130(b) (1990)). Therefore, the Ordinance would have

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the *only* establishment in Chicago that both serves alcohol drinks and presents live semi-nude erotic dancing. This evidence further supports this court's finding that the instant Ordinance does not violate the first amendment. Other clubs in the city of Chicago display nudity without violating the instant Ordinance because they do not serve alcohol. This evidence further shows that the instant Ordinance is not a ban on erotic expression, but was enacted merely to combat the negative effects that result from combining nudity and liquor.

no application at a legitimate theater. Furthermore, no evidence was presented to establish real and substantial overbreadth.

Pooh Bah also argues that the Ordinance is unconstitutionally vague in its definition of terms. The circuit court found the following terms to be unconstitutionally vague: "buttock," "any portion of the female breast at or below the areola thereof," and "shall be considered exposed to public view if it is uncovered or is less than completely and opaquely covered." The circuit court also found the following section of the Ordinance defied explanation: "any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region." A statute is unconstitutionally vague if it fails to give notice to a person of ordinary intelligence that certain conduct is prohibited or provides no standards for those who enforce it. *City of Chicago v. Morales,* 177 Ill. 2d 440, 449, 687 N.E.2d 53 (1997).

The rules of statutory construction are well known. In construing statutes, "The court must ascertain and give effect to the true intent and meaning of the legislature." *Wagner v. City of Chicago,* 166 Ill. 2d 144, 149, 651 N.E.2d 1120 (1995). To do so, courts look first to the statutory language, but "[w]here the meaning of an enactment is unclear from the statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy." *Wagner,* 166 Ill. 2d at 149.

The statutory language at issue provides:

"(d) No person licensed under this chapter shall permit any employee, entertainer or patron to

> engage in any live act, demonstration, dance or exhibition on the licensed premises which exposes to public view:
>
> (1) His or her genitals, pubic hair, buttocks, perineum and anal region or pubic hair region; or
>
> (2) Any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or
>
> (3) Any portion of the female breast at or below the areola thereof.
>
> For purposes of this section, any of the items described in subsections (d)(1) through (d)(3) shall be considered exposed to public view if it is uncovered or is less than completely and opaquely covered." Municipal Code of Chicago, Ill. §4-60-140(d) (1999).

First, in considering the term "buttocks," the Ordinance uses two different terms: "buttocks" and "anal region." It is clear from the plain meaning of the Ordinance that there is a difference between the two terms listed. When both of these terms are placed in the same sentence, a person of ordinary intelligence would realize that a G-string only covers the "anal region" and not the "buttocks."

Furthermore, Stedman's Medical Dictionary, 24th Ed. (1922), defines "buttocks" as "the prominence formed by the gluteal muscles on either side." The Eleventh circuit has defined buttocks to mean:

> "the area at the rear of the body which lies between two imaginary lines running parallel to the ground when a person is standing, the first

> or top such line drawn at the top of the cleavage of the nates [i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg] and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary lines on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg."

Geaneas v. Willets, 911 F.2d 579, 586-87 (11th Cir. 1990).

Considering the term "buttocks" within the language used in the Ordinance and given the plain meaning of the term "buttocks". as defined in the dictionary, a person of ordinary intelligence would not consider a G-string to completely cover the "buttocks." Therefore, this term is not unconstitutionally vague.

Similarly, the meaning of the phrase "any portion of the female breast at or below the areola thereof" is apparent on its face. In the circuit court, the City advocated this phrase means a horizontal line at the top of the areola drawn across a woman's chest to her sides. Webster's defines "areola" as "a colored ring (as about the nipple, a vesicle, or a pustule)." Webster's Ninth New Collegiate Dictionary 101 (1990). Based on the statutory language and the definition of areola found in the dictionary, a person of ordinary intelligence could ascertain prohibited clothing and conduct. Therefore, this term is not unconstitutionally vague.

Although the circuit court said that the term "any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region" defies explanation, the meaning is apparent on its face. Therefore, we find that the Ordinance is not unconstitutionally vague, and reverse the circuit court's finding to the contrary.

Based on all the foregoing, we find the Ordinance at issue is constitutional, not overbroad, and not vague; and therefore, we reverse the circuit court's holding to the contrary.

B. Illinois Constitution

The circuit court found that the Ordinance violated article 4 of the Illinois Constitution. The Illinois Constitution provides: "All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Ill. Const. 1970, art. I, § 4.

Pooh Bah argues that this court should uphold the circuit court's decision that the Ordinance violates the Illinois Constitution. Pooh Bah asserts that the Illinois Constitution provides greater protection than the first amendment of the United States Constitution. Pooh Bah relies on *People v. Diguida,* 215 Ill. App. 3d 913, 925, 576 N.E.2d 126 (1991), for the proposition that free speech rights under the Illinois Constitution are independent of and provide greater protection for speech and expression than the first amendment of the United States Constitution. Even though the court in *Diguida* recognized that the Illinois Constitution may, at times, provide greater protection than

the first amendment, the court did not discuss or elaborate on how the protection of article I, section 4 is greater than that of its federal counterpart or provide guidance on how this "greater protection" should be applied. Furthermore, Pooh Bah has not provided any Illinois case law providing the details of these greater protections under the Illinois Constitution or how these protections should be analyzed and applied.

Illinois courts generally apply United States Supreme Court decisions interpreting Federal constitutional provisions when interpreting similar provisions contained in the Illinois Constitution. See *e.g., People v. Levin,* 157 Ill. 2d 138, 159, 623 N.E.2d 317 (1993). Pooh Bah offers no reason why we should construe our constitution more strictly than the federal constitution on this matter. See *People v. Jones,* 322 Ill. App. 3d 236, 243, 749 N.E.2d 466 (2001), Also, Pooh Bah offers no case law providing guidance on how the extra protection provided by the Illinois Constitution should be analyzed and applied under the circumstances presented in this case. Therefore, we see no reason why we should construe our constitution differently than the federal constitution in this matter because the Illinois Constitution, like its federal counterpart, would allow for regulation of conduct based on the secondary effect the City is trying to prevent.

II. Public Nuisance Action For Injunctive Relief

The City claims on appeal that it is entitled to an injunction because the clothing at the Club violates section 4-60-140(d); therefore, the operation of the Club is a statutory nuisance under Chicago's nuisance abatement

ordinance. Municipal Code of Chicago, Ill. § 8-4-090(a) (1999).

Regarding the common law nuisance action for injunctive relief, the circuit court determined there were two relevant inquiries: 1) whether the activity complained of is in fact a nuisance; and 2) whether an injunction against the activity is an appropriate remedy. While the circuit court determined that the dancers were exposing their buttocks, it found that the exposure did not rise to the level of a common law public nuisance because (1) the term "buttocks" was not sufficiently defined in the statute; and (2) the dancers' coverage or exposure of their buttocks was not significantly different than if the dancers were wearing a string bikini on the lakefront of Chicago.

Furthermore, the circuit court ruled that not only did Pooh Bah's actions not constitute a common law public nuisance, there was an available remedy at law. The City has not challenged either of these findings related to the common law nuisance claim, resting instead on its statutory nuisance claim.

The circuit court's nuisance rulings were based on its erroneous finding that the Ordinance is unconstitutional. The circuit court's nuisance ruling was also based on its erroneous finding that the term "buttocks" was not sufficiently defined. Furthermore, even though the circuit court found that the City had shown that the dancers' buttocks were exposed, it reasoned that the dancers' coverage or exposure of their buttocks was not significantly different than if the dancers were wearing a string

bikini on the lakefront of Chicago.[2] However, this finding fails to take into account that a public beach is not an adult entertainment facility licensed to serve liquor. Pursuant to it's authority, the City issued Pooh Bah a license to sell liquor at an adult entertainment facility. As a condition of the license, Pooh Bah is required to adhere to the Ordinance. No such liquor license scheme exists on the lakefront of Chicago. As discussed above, the purpose of the Ordinance is to combat the secondary effect caused by the combination of nudity with liquor. Therefore, because the circuit court based its nuisance decision on erroneous findings, we reverse the circuit court's finding and remand the issue for a finding consistent with this order.

III. LLCC Administrative Order

The LLCC revoked Pooh Bah's liquor license because it found the dancers at the Club exposed their buttocks and breasts in violation of section 4-60-140(d). The LAC affirmed the revocation of the liquor license. Upon administrative review, after ruling that section 4-60-140(d) was unconstitutional, the circuit court entered a judgment setting aside the LLCC's order revoking Pooh Bah's liquor

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[2] Contrary to the circuit court's finding, it is questionable whether the attire worn by the dancers at the Club is proper attire for the Chicago lakefront. See Municipal Code of Chicago, Ill. § 8-8-080 (1999) ("[a]ny person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, * * * within the city of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering, shall be fined * * *.") However, this issue is not before us.

license. Notably, because the court found section 4-60-140(d) unconstitutional, it never addressed the merits of the LLCC decision to determine whether the LLCC was correct in finding the facts presented showed a violation of the Ordinance, or whether the appropriate response to the violation was to revoke Pooh Bah's liquor license.

Because we have upheld the validity of the Ordinance and reversed the circuit court's decision finding the Ordinance unconstitutional, the merits of the LLCC's determination must be addressed. Because the circuit court failed to address the merits of the LLCC's decision, we remand this issue for administrative review.

Conclusion

For the foregoing reasons, the judgment of the circuit court is reversed and the cause is remanded to the circuit court for determinations consistent with this order.

Reversed and Remanded.

GARCIA, J., with CAHILL and McBRIDE, JJ., concurring.

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

CITY OF CHICAGO, an Illinois municipal corporation,	)	
Plaintiff-Counterdefendant,	)	
v.	)	
POOH BAH ENTERPRISES, INC., an Illinois corporation, and PERRY MANDERA,	)	**No. 99 CH 9682**
Defendants-Counterplaintiffs.	)	
POOH BAH ENTERPRISES, INC., an Illinois corporation; ACE ENTERTAINMENT CO., INC., an Illinois corporation; PERRY MANDERA, Pooh Bah president and Ace Entertainment Co., Inc. president; LISA D. SIMS, CHRISTEN E. HADSALL, and SUSAN L. LJENQUIST, entertainers and dancers; and PETER ABRUZZO,	)	
Plaintiffs,	)	
v.	)	
CITY OF CHICAGO, an Illinois municipal corporation; RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago; WINSTON MARDIS, in his official capacity as Director of the Mayor's License Commission; LICENSE APPEAL COMMISSION; WILLIAM D. O'DONAGHUE, Chairman; ALBERT D. McCOY and IRVING J. KOPPEL, Commissioners,	)	**No. 93 CH 4559**
Defendants.	)	

PARTIAL JUDGMENT ORDER[1]

These cases are before the court on Pooh Bah's motions for directed findings and for judgment at the conclusion of the City's case-in-chief on the City's Counts I-V in No. 99 CH 9682 and on Pooh Bah's Counts VI and VII in No. 93 CH 4559, and on the parties' stipulation submitting the cases for a ruling on the current record, along with the record on administrative review, subject to reservations by all parties of their respective rights to present additional evidence if these motions are not finally dispositive; and the court, being fully advised in the premises, does now FIND:

1. The City has rested on its following claims and defenses, which are ripe for a ruling on Pooh Bah's motions for directed findings and for judgment:

   (a) Counts I-III of its complaint in No. 99 CH 9682 (seeking injunctive relief);

   (b) the liability issues in Counts IV and V of its complaint in No. 99 CH 9682 (seeking fines); and

   (c) its defense against Pooh Bah's facial constitutional attack on § 4-60-140(d) of the Chicago Municipal Code;

2. The court reaffirms the rulings set forth in its Memorandum Opinion and Order issued January 18, 2001 ("January 18th Memorandum Opinion")

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[1] In this order, "City" refers to plaintiff in No. 99 CH 9682 and, collectively, to defendants in No. 93 CH 4559; and "Pooh Bah" refers, collectively, to defendants in No. 99 CH 9682 and to plaintiffs in No. 93 CH 4559.

and in the transcript of proceedings in this case dated August 21, 2000 ("August 21st Rulings"), and

3. Appellate review of this court's decision, as set forth in the January 18th Memorandum Opinion and the August 21st Rulings, will expedite the ultimate resolution of this matter and conserve judicial resources;

WHEREFORE, IT IS HEREBY ORDERED:

1. For the reasons stated in the January 18th Memorandum Opinion and the August 21st Rulings, Pooh Bah's motions for directed findings and for judgment are granted, and therefore:

   (a) in case No. 99 CH 9682, judgment is entered for Pooh Bah and against the City on Counts I-V of the complaint; and

   (b) in case No. 93 CH 4559, judgment is entered for Pooh Bah and against the City on Counts VI and VII, and the order of the Chicago License Appeal Commission in No. 93 LA 11, affirming the order of revocation entered by the Mayor's License Commission in No. 93 LR 32, is reversed; charges 1-22 in No. 93 LR 32 are dismissed; and the revocation of Pooh Bah's City licenses is vacated and set aside;

2. The January 18th Memorandum Opinion and the August 21st Rulings are incorporated into and made a part of this order;

3. The court retains jurisdiction:

   (a) in No. 99 CH 9682, over Pooh Bah's pending amended counterclaims and the City's affirmative defenses thereto;

(b) in No. 93 CH 4559, over Pooh Bah's remaining claims and the City's affirmative defenses thereto;

(c) over the remaining trial of these matters, if any of the judgments herein shall be reversed or vacated, for which purpose:

(i) the City has reserved its right to present additional evidence on the amount of the fines to be assessed on Counts IV and V in 99 CH 9682; and

(ii) Pooh Bah has reserved its right to present additional evidence in opposition to Counts I-V and in support of its affirmative defenses and amended counterclaims in No. 99 CH 9682, and in support of its claims in No. 93 CH 4559, if the judgments in this order are not affirmed in a final and non-appealable order;

4. All proceedings in these two cases shall be stayed pending a final order on the appeal from this order;

5. There is no just reason for delaying enforcement or appeal of the judgments in this order; and

6. This order shall be entered in both No. 99 CH 9682 and No. 93 CH 4559.

ENTER:

_____

Judge

AGREED:

/s/ Robert J. Weber
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Chicago, Illinois 60602

Robert J. Weber
Law Offices of
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Attorneys for the
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DATED: April ___, 2001.

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

CITY OF CHICAGO, an Illinois municipal corporation,	)	
Plaintiff-Counterdefendant,	)	
v.	)	
POOH BAH ENTERPRISES, INC., an Illinois corporation, and PERRY MANDERA,	)	**No. 99 CH 9682**
Defendants-Counterplaintiffs.	)	
POOH BAH ENTERPRISES, INC., an Illinois corporation; ACE ENTERTAINMENT CO., INC., an Illinois corporation; PERRY MANDERA, Pooh Bah president and Ace Entertainment Co., Inc. president; LISA D. SIMS, CHRISTEN E. HADSALL, and SUSAN L. LJENQUIST, entertainers and dancers; and PETER ABRUZZO,	)	
Plaintiffs,	)	
v.	)	
CITY OF CHICAGO, an Illinois municipal corporation; RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago; WINSTON MARDIS, in his official capacity as Director of the Mayor's License Commission; LICENSE APPEAL COMMISSION; WILLIAM D. O'DONAGHUE, Chairman; ALBERT D. McCOY and IRVING J. KOPPEL, Commissioners,	)	**No. 93 CH 4559**
Defendants.	)	

AGREED
CONSOLIDATION ORDER

On the motion of the parties[2] to consolidate these two actions for purposes of trial and evidentiary records in this court, and to adopt and to consolidate the record of the preliminary injunction hearing No. 99 CH 9682 into the record of the trial on the merits in both cases, and the court being fully advised in the premises; the court finds that the consolidations requested are in the interests of judicial efficiency and economy, and are agreed to by all parties in both cases, and does now ORDER:

1. Cases No. 93 CH 4559 and No. 99 CH 9682 are consolidated for purposes of trial and evidentiary records;

2. The evidentiary record of the hearing on the City's motion for preliminary injunction in No. 99 CH 9682, including evidentiary rulings therein, is adopted as part of, and is incorporated into, the record of the trial on the merits of the parties' claims and counterclaims in both consolidated cases (Nos. 93 CH 4559 and 99 CH 9682);

3. The City has rested on its Counts I, II and III in No. 99 CH 9682, and has rested on the liability issues of Counts IV and V in No. 99 CH 9682, but the City has reserved its right to present additional evidence on the amount of fines to be assessed against Pooh Bah on Counts IV and V in No. 99 CH 9682, in the event that those claims survive Pooh Bah's motions for directed findings and judgment in this court on appeal;

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[2] In this order, "City" refers to plaintiff in No. 99 CH 9682 and, collectively, to defendants in No. 93 CH 4559; and "Pooh Bah" refers, collectively, to defendants in No. 99 CH 9682 and to plaintiffs in No. 93 CH 4559.

4. Pooh Bah is granted leave to file its First Amended Counterclaims in No. 99 CH 9682; and

5. This order shall be entered in both No. 99 CH 9682 and No. 93 CH 4559.

ENTER:

_____
Judge

AGREED:

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DATED: April ___, 2001.

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

CITY OF CHICAGO, an Illinois Municipal corporation, Plaintiff, v. POOH BAH ENTERPRISES, INC., An Illinois corporation, and PERRY MANDERA, Defendants.	)	99 CH 9682

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiff CITY OF CHICAGO'S Complaint for Equitable and Other Relief, brought against Defendants POOH BAH ENTERPRISES, INC. and PERRY MANDERA. The Court is fully advised in the premises, having heard testimony from numerous witnesses, considered all papers submitted, and examined all exhibits entered into evidence.

While the City initially brought this case under several theories, what remains for this court to determine is first, whether Pooh Bah's operation of Crazy Horse Too creates a public nuisance which should be enjoined by this court pursuant to its equitable powers. Second, the court must determine whether the City of Chicago liquor dealers ordinance Section 4-60-140 titled "Prohibited Activities" is constitutional within the First and Fourteenth Amendments of the United States Constitution and Article I, Section 4 of the Illinois Constitution.

FACTS

Defendant POOH-BAH ENTERPRISES, INC. ("Pooh Bah") is owned by Co-Defendant PERRY MANDERA ("Mandera"), and is located at 1531 North Kingsbury, Chicago, Illinois. Pooh Bah operates Crazy Horse Too ("Crazy Horse"), a nightclub which provides so-called "adult oriented entertainment." Crazy Horse has a liquor license issued by Plaintiff CITY OF CHICAGO ("City"), which allows it to serve alcoholic beverages. Crazy Horse charges an entrance fee at the door of $10.00 per person. Customers pay for their own drinks.

The entertainment at Crazy Horse is provided by female dancers in the form of either a "stage dance" or a "table dance". A stage dance is performed on a raised platform located behind the bar and all present are able to view the stage dancers without being charged extra. A table dance, as the name implies, is performed for an individual paying customer at the customer's table. Once the table dance is completed, the customer sometimes purchases a drink for himself but that is not required. As a matter of fact, the ordinance does not permit the dancers to solicit drinks. Section 4-60-140(b)(1). No evidence at all was presented that the dancers did solicit drinks.

The table dancers typically begin their dances while fully clothed, sometimes wearing costumes. They then gradually remove their clothing to the music, during the course of the dance, which testimony indicates lasts anywhere from 1-3 minutes. Once disrobed, the shape and form of the dancer's breasts are exposed and portions of the breasts are typically covered with several layers of a latex substance applied over a pancake make-up base. In

addition, the dancers typically wear thong bottoms, which are also known variously as "G-strings" or "T-bars".

CITY ORDINANCE AND ALLEGATIONS

The City's liquor license ordinance prohibits exposure of certain anatomical areas in a licensed liquor establishment. In particular, Section 4-60-140(d) of the ordinance provides as follows:

> "No person licensed under this chapter shall permit any employee, entertainer, or patron to engage in any live act, demonstration, dance or exhibition on the licensed premises which exposes to public view:
>
> (1) His or her genitals, pubic hair, buttocks, perineum and anal region or public hair region; or
>
> (2) Any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or
>
> (3) Any portion of the female breast at or below the areola thereof.
>
> For purposes of this section, any of the items described in subsections (d)(1) through (d)(3) shall be considered exposed to public view if it is uncovered or is less than completely and opaquely covered."

The City alleges in Paragraph 39 of their complaint, that "(t)he activities on the subject property constitute a public nuisance in that female performers engage in live acts, demonstrations, dances or exhibitions on the subject property which expose to public view portions of the

female breast at or below the areola, the buttocks, the pubic hair region, and portions of the genitalia . . . in an establishment licensed to serve alcohol." The City argues that the above combination of alleged illegal coverage and the service of alcoholic beverages requires a determination that Pooh Bah is a public nuisance which should be enjoined by this Court.

A. ACTION AT PUBLIC NUISANCE

A nuisance action for injunction involves two inquiries: (1) whether the activity complained of is in fact a nuisance; and (2) whether an injunction against the activity is an appropriate remedy. *City of Chicago, v. Festival Theater Corporation,* 91 Ill. 2d. 295, 312 (1982). Defining acts that constitute a public nuisance is not a simple matter. In the words of the Illinois Supreme court, the "[c]oncept of common law public nuisance . . . eludes precise definition." *Id.* at 306. Black's Law Dictionary defines a public nuisance as "an unreasonable interference with a right common to the general public . . . behavior which unr[e]asonable [sic] interferes with the health, safety, peace, comfort or convenience of the general community." Finally, the Illinois Supreme Court defines a public nuisance as "(a) public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace or of the general good order and welfare of society." H. Wood, *The Law of Nuisances,* Sec. 68 (3rd ed. 1893); *City of Chicago v. Shaynin,* 258 Ill. 69, 72 (1913); *Festival Theater,* 91 Ill. 2d. 295 at 304.

The violation of an ordinance can be considered to be a public nuisance. In the present case, the City attempted to prove that the dancers' breasts were not covered in the

manner required by the City ordinance. The City provided a demonstrative witness ("the model") whose testimony addressed the quantity of base makeup and latex covering she applied to her breasts. The models' testimony was inconsistent with the testimony provided by Pooh Bah's makeup artist and the dancer's themselves.

The models' instructions for the number of layers of makeup and the consistency of the pancake base apparently differed from the normal, everyday practices of the dancers and the makeup artist. In addition, testimony was presented by Pooh Bah that the models makeup coverage was inspected several times an evening by management. Regardless, the City's live demonstration was of little probative value due to the marked differences between the courtroom and Crazy Horse Too in terms of the lighting conditions and the atmosphere. The Court agreed to the demonstration in the interest of allowing the City to present their case as they saw fit, but has given very little weight to its effect.

The City also relied on a series of four (4) videotapes taken by undercover police Officer Joseph Ramirez in the company of Officer Donald Marquez on February 6, 9, 13 and 14, 2000. Officer Ramirez testified that the video camera device was planted in his necktie. The Court agreed to view the videotapes *in camera* during the course of the trial. In terms of coverage issued, the Court was unable to see any possible evidence of illegal exposure, beyond the buttocks. However the Court finds that the poor quality of the videotapes together with the problematic issues related to possible discovery abuses and gaps in the chain of custody render their probative value virtually nil.

All that being said, the Court finds that the city has shown that the dancers' buttocks are exposed. However, all they have shown is that the dancers' buttocks are exposed in a manner which is not sufficiently defined, which the Court will address later as part of the Constitutional analysis. For the public nuisance aspect of the case, however the Court finds that the dancers' coverage or exposure of their buttocks is not significantly different than if the dancers were wearing a string bikini on the lakefront of Chicago, and therefore, does not constitute a public nuisance.

Finally, the City did not produce any neighbors – either commercial or residential owners or tenants – who complained about the existence of or the effects of Crazy Horse. No testimony was offered by the City that Crazy Horse operated in a manner which unreasonably interferes with the health, safety, peace, comfort or convenience of the general public or "tends to the corruption of morals, to a disturbance of the peace or of the general good order and welfare of society" as required under Illinois law.

Taking all of the City's expert testimony together it appears that certain areas of the city at one time had serious problems such as the ones the City is trying to combat in this case. However, the City's experts concede that these problems have vastly diminished and their numbers are a fraction of what they once were. It also appears that these problems do not exist in the Crazy Horse area. Not one incident has been shown to the Court. In fact, the City's own expert conceded that it was not this ordinance that produced the reduction; rather, it was a concerted police effort that concentrated on the crimes and provided criminal arrests and convictions that produced the results.

In conclusion, the City has not offered any proof let alone proven any facts which would lead this Court to believe that Crazy Horse Too is being operated by Pooh Bah and Mandera in a manner which constitutes a public nuisance pursuant to the definition set forth by the Illinois Supreme Court in *Festival Theater.* 91 Ill. 2d. 295 (1982).

2. Injunctive Relief

In addition to proving that Pooh Bah's operation of Crazy Horse Too is a public nuisance, the City of Chicago is required to prove injunctive relief is the appropriate remedy for their harm by showing: (1) it does not have an adequate remedy at law, and (2) it has a likelihood of success on the merits. Both parties agree that the applicable case law is clear that the City does not need to make a showing of irreparable harm in order to succeed in obtaining a preliminary injunction against Pooh Bah.

The City has failed to show that it has an inadequate remedy at law. Under *Festival Theater,* it is clear that an injunction "should not issue unless criminal prosecution is shown to be an inadequate remedy." *Festival Theater,* 91 Ill. 2d. 295 at 315. The City did not present any evidence that it attempted any criminal prosecution of either Pooh Bah, Inc., owner Perry Mandera, or its employees, the dancers at Crazy Horse Too. In fact, because the City failed to prove its case on both the prostitution and solicitation grounds, this Court granted Pooh Bah's motion for a directed verdict on those counts. In addition, if the liquor license laws in fact are violated, the City has the right to bring administrative hearings to fine or close the establishment.

Neither did the City show that it had pursued available civil remedies. Section 4-60-200 of the Municipal Code of Chicago provides a penalty for violations of the liquor license ordinance as follows:

> "Any person violating any of the provisions of this Chapter shall be fined not less than $300.00 nor more than $1,000.00 for each offense, except where otherwise specifically provided. A separate and distinct offense shall be held to have been committed each day any person continues to violate any of the provisions hereof."

The City argues that an imposition of monetary fines would be an be [sic] an inadequate remedy because Pooh Bah makes so much money that it would not be affected by the available fine. The City cited *City of Chicago v. Cecola,* wherein the Supreme Court of Illinois affirmed the trial court's permanently enjoining the defendants from operating a "masturbatory massage parlor". *City of Chicago v. Cecola,* 75 Ill. 2d 423 (1979). In *Cecola,* the Court held that "[I]t is reasonable to conclude that the imposition of even the maximum fine of $200 a day may not be enough to dissuade defendants from [their] enterprise." *Id.*

The Court is equally persuaded that the converse is also true; it is reasonable to conclude that in the present case, imposition of the maximum fine of $1,000.00 per day may well be sufficient to dissuade Pooh Bah, Perry Mandera and its dancers from any activity which violates the ordinance. The City argued that the ordinance is violated hundreds of times a night, day in and day out, 7 days a week, and has been for the last 7 years. If the City feels that Pooh Bah dancers are indeed exposing themselves in violation of the ordinance, the Court feels that the first and best approach would be for the undercover police

officers to fine the dancers as well as the owner at the time the violation occurs. If the violations are indeed perpetrated by more than one person 7 days a week for 7 years at a possible $1,000.00 per day, it is obvious to anyone that a great deal of money is at stake. Again, the City has not taken any action on an administrative level to impose sanctions on Pooh Bah.

In addition, Section 4-60-100(d) of the Liquor Dealers ordinance of the City of Chicago provides as follows:

> "a sign that measures 14 inches by 14 inches shall be posted in a visible location in every tavern stating: 'a person exiting this establishment must depart in a quiet and courteous fashion, and must not cause disturbances to nearby residents, litter or damage private property.' Any person who violates the provision of this subsection shall be subject to a fine of $500.00 plus $100.00 per each day of a continuing violation. Nothing in this subsection applies to a licensed tavern within a hotel, or to any restaurant."

It would appear to this Court that if a nuisance did exist, the City of Chicago should also have been able to present evidence of the existence of litter, damage to property, or complaints from neighbors in accordance with this section of the ordinance. The City failed to show even one act that would fit into that category. No resident was brought forth to complain of such acts and not one case of a fine being levied pursuant to this or any other section of the code was presented as evidence.

While the City does not have to show irreparable harm, they must show that something exists that residents, neighbors or the general public deem offensive. If no one causes any disturbances, if no one complains, if no

fines are levied, and no arrests are made, where is the public nuisance? This Court has to wonder why such a massive effort by the City was pursued when the evidence is so clearly lacking.

Undercover police officers Ramirez and Marquez tried to entrap the dancers in an attempt to show prostitution and solicitation. According to the clear evidence presented at the trial, the dancers were not interested. The police tried using video cameras planted in their neckties – James Bond style – to show violations. That failed too. The simplest thing that could have been done by the City would have been to produce residents who were affected by the existence of Crazy Horse. None were brought forth. At least five police officers, a minimum of five assistant corporation counsels and the latest in modern technology were used to present a case that totally devoid of proof.

There was *no* public nuisance proved by the City of Chicago.

B. CONSTITUTIONAL ISSUES

Having found that no public nuisance was proved by the City, the Court must next examine the constitutional issues. If the constitutional objections to the ordinance are deemed valid, the further course of the litigation may well be moot. Since constitutional issues are raised with respect to both the Federal Constitution and to the Illinois Constitution, both will be discussed.

In its defense, Pooh Bah argues that the section City's liquor dealers ordinance describing prohibited activities is unconstitutional. Pooh Bah argues first that

the ordinance is a content-based restriction on erotic expression protected by the first amendment of the United States Constitution and thus is subject to strict scrutiny. Second, Pooh Bah argues that the ordinance is unconstitutionally vague in its definition of terms in violation of the due process clause of the fourteenth amendment to the United States constitution. Third, it argues that the ordinance is unconstitutionally overbroad in that it bans performances containing expressive nudity only where alcohol is sold. Finally, Pooh Bah argues that the ordinance violates Article I, Section 4 of the Illinois Constitution.

1. Content-Based or Content-Neutral Restriction

The most hotly contested constitutional argument is whether the ordinance is a content-based restriction on, and only on, erotic expression protected by the First Amendment of the United States Constitution which provides in part that "Congress shall make no law . . . abridging the freedom of speech or of the press." Erotic dancing has long been deemed to be expression, which is protected by the First Amendment. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991). What level of scrutiny applies is determined by whether the ordinance is related to the suppression of expression. *Texas v. Johnson,* 491 U.S. 397, 403 (1989). The Court must first determine whether the ordinance is a content-based restriction which should be evaluated under the more stringent framework of strict scrutiny, as advocated by Pooh Bah, or whether it is content-neutral and therefore subject to the more easily proven intermediate scrutiny standard as advanced by the City. *DiMa Corporation v. Town of Hallie,* 185 F.3d 823, 827 (7th Cir. 1999).

The City argues that its ordinance is "aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments and not at all at suppressing the erotic message conveyed by this type of dancing." (City of Chicago Memorandum in Opposition to Pooh Bah's Motion for a Directed Verdict, page 13). The City argues that the ordinance is merely a regulation of where liquor can be sold and thus must be proven by the less demanding standard of intermediate scrutiny.

Conversely, in support of its position, Pooh Bah argues that the ordinance is not a simple anti-nudity law but rather it mandates a particular level or degree of coverage of certain specified (but vaguely articulated) areas of the female body. Further, Pooh Bah argues that the ordinance is not of general applicability because it does not apply everywhere in the city but only to licensed liquor establishments. In sum, Pooh Bah's argument is that selective targeting of Section 4-60-140(d) to only erotic entertainment, and then only in some venues, makes the ordinance a content-based restriction, which cannot survive scrutiny.

Case law regarding erotic expression is at best, fractured. This Court must look to the Supreme Court of the United States as the ultimate authority on First Amendment issues. However, not surprisingly, the Supreme Court has chosen to dance around the issues by laying a nearly incomprehensible roadmap for municipalities and state courts to interpret. In spite of murky precedents, however the City and Pooh Bah have both presented persuasive and cogent legal arguments in support of their respective points of view.

The ordinance in this case targets only certain types of entertainment in certain types of venues. The ordinance makes it illegal for Pooh Bah Enterprises and Perry Mandera (as the 'person') to permit the dancers to expose to public view certain body parts, only because they have a liquor license. The ordinance does not apply to those establishments that do not have a liquor license and therefore, totally nude dancing is allowed in places that do not serve alcohol. As has been conceded by the City, it would allow the same Crazy Horse dancers to perform totally nude in an alcohol-free ice cream parlor. It is the Court's opinion that most citizens of Chicago would likely be astonished to learn that the City would permit semi-nude or totally nude dancers or waitresses in an open ice cream parlor, presumably frequented by families and children, and not in an establishment such as Crazy Horse where at least admission is regulated and controlled.

The City argues that it has "reasonable bases for believing that criminals are attracted to the areas around establishments presenting nude entertainment and serving alcohol; that persons in those areas are more vulnerable to crime; and that persons exposed to both alcohol and nudity are more likely to engage in risky sex, prostitution and other criminal or dangerous acts." (City of Chicago Memorandum in Opposition to Pooh Bah's Motion for a Directed Verdict, page 15.) The City's position is that all it needs is this reasonable belief in order to enact the ordinance.

In support, the City cites *Barnes v. Glen Theatre,* 501 U.S. 561 (1991) and *City of Erie v. Pap's A.M., tdba "Kandyland",* 120 S.Ct. 1382 (2000). However, the ordinances in those cases were directed toward totally nude dancing where in this case, the ordinance in question is

directed toward semi-nude dancing. Therefore, *Barnes* and *Erie* are not necessarily controlling. The Court finds that it is the expression contained in the semi-nude dancing at Pooh Bah that is being targeted by the ordinance and therefore, the ordinance is subject to review under the strict scrutiny analysis.

In order to survive strict scrutiny, the City must show that (1) the ordinance is justified by a compelling governmental interest; and (2) it has chosen the least restrictive means of furthering that interest. The city argues that the ordinance is justified by the "secondary effects" of the combination of alcohol and the semi-nude entertainment offered at Pooh Bah. In support, the City presented Dr. Wesley Skogan who testified that an increased likelihood of crime existed in neighborhoods with adult entertainment establishments. Dr. Skogan discussed studies from several cities including Cleveland, Minneapolis, and Los Angeles, which he testified showed an increase in violent crime and crimes against property in areas surrounding establishments which sell alcohol. He also cited the Garden Grove study, which determined that when an adult business operated in close proximity to an establishment selling alcohol, there was an additional increase in crime beyond that attributable to either business separately, yet the ordinance does not apply equally to liquor establishments in hotels. However, as stated beforehand, not one scintilla of evidence showed increased crime. Arguably, Dr. Skogan's. hypothesis might be true in the context of those studies that focused on clusters of adult businesses more closely related to the stereotypical "peep-show" or adult bookstore. As a matter of fact, according to the police officers, the types of crime that this ordinance is supposed to protect against have diminished

because of policies and programs previously implemented by the City administration and police.

In addition, the City presented its own Assistant Commissioner of Zoning, Thomas Smith. Mr. Smith testified that numerous studies around the country indicate that the areas where one or more adult uses are located have significantly higher crime rates, especially for sex-related crimes. But no evidence was to show that crime had increased in the Crazy Horse area. On that, the record is silent.

Finally, the City presented Dr. Allen Kodish who testified to the psychiatric effects on males of the combination of alcohol and sexual stimulation. Dr. Kodish testified that alcohol tends to disinhibit sexual and aggressive impulses, and to impair social judgment and that visual erotica tends to sexually stimulate the viewer and to further disinhibit aggressive impulses. However, on cross-examination, Pooh Bah elicited from Dr. Kodish that an increase in alcohol consumption also brought with it a marked inability for males to perform sexually. Dr. Kodish essentially found that having a few drinks effectively diminished most mens ability to function.

It is true that the United States Supreme Court allows the City to enact ordinances that combat secondary effects. *City of Erie,* 120 S.Ct. 1382, 1386 (2000). However, the City has not even come close to demonstrating the existence of or even the possibility of the existence of these effects. The Court finds the record devoid of any proof of the existence of even potentially harmful secondary effects. Indeed, it finds that the City was successful in merely positing the possibility that those secondary effects could hypothetically exist. While the City argues that this

is all that is necessary for it to show, that might be true if the ordinance in question was a simple anti-nudity ordinance. It is not.

Freedom of Expression is a right deeply engrained into the American legal system and into the psyche of its citizens. The Court must zealously protect these rights.

2. Void for Vagueness

Pooh Bah argues that the ordinance in question is unconstitutionally vague in its definition of terms and therefore violates the due process clause of the fourteenth amendment to the United States Constitution. Without a doubt, this is the easiest of the constitutional grounds in which to rule in Pooh Bah's favor.

While the Court finds that section 4-60-140 fails as being vague, particularly confusing are the following terms or definitions: "buttocks" as set forth in Section 4-60-140(d)(1); "any portion of the female breast at or below the areola thereof", Section 4-60-140(d)(3); "shall be considered exposed to public view if it is uncovered or is less than completely and opaquely covered." Finally, Section 4-60-140(d)(2) forbids "any device, costume or covering which gives the appearance of or simulates the genitals, public [sic] hair, buttocks, perineum, anal region or pubic hair region." This sentence defies explanation.

3. Overbreadth

Pooh Bah argues that the ordinance is unconstitutionally overbroad in that it bans performances containing expressive nudity only where alcohol is sold. At the same time, the ordinance allows other entertainment to take

place pursuant to Section 4-6-130(b) which states in relevant part:

> "The operator of a theater presenting live stage performances licensed to sell alcoholic liquor for consumption on the premises as an incidental activity may serve alcoholic liquor during a period limited to one hour prior to the start of the performance and during intermission provided that sales are restricted to lobby areas . . . "

Nudity is no stranger to legitimate theater. Neither is nudity a stranger to ballet or modern dance. Many of the theaters presenting performances of these types sell alcoholic beverages pursuant to the above section of the ordinance. Would these performances be shut down by the City as constituting public nuisances? The Court thinks not. There have been and no doubt are scheduled numerous performances in theaters around the City which would violate the ordinance. The Court has already addressed the City's comments regarding the hypothetical "nude ice cream parlor" which also addresses Pooh Bah's overbreadth argument, but hereby includes that analogy as part of the overbreadth argument.

Finally, on this same subject, the ordinance prohibits "any live act, demonstration, dance or exhibition on the licensed premises." The word "live" is particularly interesting. Major television and cable networks today present motion pictures and videotape in which totally nude people engage in all types of sexual activity. Under the ordinance it would appear that if those films, which are not live, were projected onto giant screens where alcoholic beverages were sold, as is the case at Pooh Bah, that would be permissible according to the City. Such venues could conceivably be called a new age "sports bar". Theoretically,

films of this nature could be projected at any restaurant where alcohol is served. The Court raises this point in this fashion merely to show how faulty the ordinance really is. The Court therefore finds that Section 4-60-140 of the liquor dealers ordinance is unconstitutional as being overbroad.

4. Illinois Constitution

Before proceeding forward, the Federal and Illinois Constitutions must be examined to see how they compare. The First Amendment of the Federal Constitution states in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Article I of the Illinois Constitution is the State Bill of Rights, with Section 4 titled Freedom of Speech stating: "All persons may speak, write and publish freely, being responsible for the abuse of that liberty." It then goes on to discuss trials for libel and defenses thereto.

In 1998, Justice James Heiple of the Illinois Supreme Court and Kraig James Powell wrote an article in which they discussed state constitutional interpretation. Justice Heiple wrote:

> "[I]n the late 1970's Supreme Court Justice William Brennan, Jr., disappointed with what he viewed as the Court's refusal to expand further its protection of individual rights under the Federal Constitution, called on 'state courts to step into the breach' by safeguarding civil rights and liberties through interpretation of their own state constitutions. More than two decades later, it is apparent that many state courts have accepted Brennan's invitation. State courts have now rendered hundreds of decisions which grant

> greater protection to individual rights under state constitutions than the Supreme Court has been willing to afford under the Federal Constitution." (1 Alb. L. Rev. 1507, 1509).

In 1984, former Illinois Supreme Court Justice Seymour Simon stepped into the breach. Justice Simon placed Justice Brennans's principles in the context of Illinois law wherein he disagreed with the majority of the Illinois Supreme Court's assumption that similar provisions contained in the Federal and Illinois Constitutions should be automatically be interpreted in an identical fashion. *People v. Rolfingsmeyer,* 101 Ill. 2d 137, 143 (1984) (Simon, J., specially concurring). Justice Simon stated that "[a]s justices of the highest court of the State of Illinois we take an oath of office to faithfully uphold the provisions of the State Constitution. We cannot delegate that duty to anyone – not to the legislature, nor the Governor, nor to any Federal Court." *Id.* The Illinois Supreme Court in *Rolfingsmeyer* held that Illinois' constitutional protection against self-incrimination is not broader than that of the Federal Constitution. *Id.* at 142. In making that determination, the Court looked to the Record of Proceedings of the 1970 Illinois Constitutional Convention and stated that it "reflect[ed] a general recognition and acceptance of interpretations by the United States Supreme Court." *Id.* The same Record of Proceedings shows that the delegates intended Article I, Section 4 of the 1970 Constitution to be independent of the Federal Constitution. Seng, Michael P., *Freeedom of Speech, Press and Assembly and Freedom of Religion under the Illinois Constitution,* 21 Loy.U.Chi.L.J. 91, 114 (1989). Elmer Gertz, chairman of the Bill of Rights Committee explained that "[w]e felt that there were certain elements added by the more expansive language in the Illinois bill of rights, and we felt that every protection

that the citizen has by reason of the First Amendment, of course, he would continue to have by reason of the Illinois language and perhaps added protections in the field of libel and perhaps in other fields." (3 Record of Proceedings). While these "other fields" were not specified by the committee, presumably they are left open to interpretation by the judiciary, as to when to expand rights under the Illinois Constitution.

It appears to this court that the difference between the two constitutions is that the Federal Constitution lays down a prohibition against enacting laws interfering with the freedom of speech. The Illinois Constitution, on the other hand, grants to its citizens the right "to speak, write and publish freely." The federal free speech clause is a prohibition, while the state free speech clause expands a right. The Supreme Court of Illinois has found that the Illinois Constitution may provide "greater protection to free speech than does its Federal counterpart." *People v. DiGuida,* 152 Ill. 2d 104, 121 (1992).

The next question the Court must address is what does "free" or "freely" mean. Black's Law Dictionary defines "free" as "not subject to legal constraint of another." Non-legal dictionaries closely parallel this definition. For example, Webster's New World College Dictionary, 4th Ed., 1999, in part defines "free' as: "having, or existing under, a government that does not impose arbitrary restrictions on the right to speak . . . " It would appear to this Court that reinforcing a right a citizen possesses, which right is not subject to legal constraint or which does not impose arbitrary restrictions, is much stronger than forbidding the government from enacting laws that abridge speech.

Having already found that this ordinance should be viewed under a strict scrutiny standard under the Federal Constitution, this Court must conclude that under Illinois' stronger freedom of speech article, a strict scrutiny standard must certainly be employed. The Court finds that under a strict scrutiny analysis, the ordinance does not pass muster under the Illinois Constitution. Even if the ordinance were found to not violate the first amendment of the Federal Constitution, under either an intermediate or strict scrutiny analysis, the Court finds that the ordinance is an unlawful infringement on Pooh Bah's right to speak freely under the Illinois Constitution. Without any evidence of a public nuisance or harmful secondary effects, the ordinance impermissibly prohibits the sale or consumption of alcoholic beverages merely because the dancers appear in various stages of undress.

ORDER

Based on the foregoing, it is clear to this court that the City of Chicago does not have a likelihood of success on the merits. Both sides have apparently agreed that this Preliminary Injunction records would be made a part of any trial later conducted on the merits. The Court finds first that the Plaintiff CITY OF CHICAGO is not likely to be able to prove that Defendants' POOH BAH ENTERPRISES, INC. and PERRY MANDERA's operation of Crazy Horse Too is in any way a public nuisance. Second, the Court finds that Section 4-60-140 of the Municipal Code of the City of Chicago is unconstitutional for the reasons stated above.

The following is therefore hereby ORDERED ADJUDGED and DECREED:

1) The Plaintiff, CITY OF CHICAGO's Petition for a Preliminary Injunction against the Defendants POOH BAH ENTERTAINMENT, INC. and PERRY MANDERA be and hereby is DENIED; and

2) Section 4-60-140 of the liquor dealers' ordinance of the Municipal Code of the City of Chicago addressing prohibited activities be and hereby is declared unconstitutional.

January 18, 2001 /s/ Aaron Jaffe
Date HON. AARON JAFFE

(*Published by Authority of the City Council of the City of Chicago*)

JOURNAL *of the* PROCEEDINGS
OF THE
CITY COUNCIL
OF THE
CITY OF CHICAGO, ILLINOIS

Regular Meeting – Tuesday, January 17, 1978

at 10:00 A.M.

(*Council Chamber – City Hall – Chicago, Illinois*)

OFFICIAL RECORD.

Attendance at Meeting.

Present – Honorable Michael A. Bilandic, Mayor, and Alderman Roti, Barnett, Kenner, Lathrop, Sawyer, Wilinski, Humes, Adduci, Vrdolyak, Huels, Kwak, Madrzyk, Burke, Barden, Shannon, Kellam, Joyce, Stewart, Lipinski, Rhodes, Marzullo, Zydlo, Ray, Washington, Cross, Hagopian, Keane, Gabinski, Mell, Frost, Laskowski, Aiello, Casey, Gutstein, Pucinski, Natarus, Oberman, Simpson, Schulter, Saperstein, Stone.

Absent – Alderman, Evans, Jaksy, Kelley, Stemberk, Cullerton, Laurino, Fifielski.

Call to Order.

On Tuesday, January 17, 1978, at 10:00 A.M., (the day and hour appointed for the meeting) Honorable Michael A. Bilandic, Mayor, called the City Council to order, John C. Marcin, City Clerk, called the roll of members and it was found that there were present at that time: Alderman Roti, Barnett, Kenner, Lathrop, Sawyer, Wilinski, Humes, Adduci, Vrdolyak, Huels, Kwak, Madrzyk, Burke, Barden, Shannon, Kellam, Joyce, Stewart, Lipinski, Rhodes, Marzullo, Zydlo, Ray, Washington, Cross, Hagopian, Keane, Gabinski, Mell, Frost, Laskowski, Aiello, Casey, Gutstein, Pucinski, Natarus, Oberman, Simpson, Schulter, Saperstein, Stone – 41.

Quorum present.

Invocation.

Reverend Father Alex M. Kasper, O.P., St. Pius Roman Catholic Church, opened the meeting with prayer.

* * *

On motion of Alderman Burke the committee's recommendation was *Concurred In* and said appointment of Mr. Bruce Sagan was *Approved*, by yeas and nays as follows:

Yeas – Alderman Roti, Barnett, Kenner, Lathrop, Sawyer, Wilinski, Humes, Adduci, Vrdolyak, Huels, Kwak, Madrzyk, Burke, Barden, Shannon, Kellam, Joyce, Stewart, Lipinski, Rhodes, Marzullo, Zydlo, Ray, Washington, Cross, Hagopian, Keane, Gabinski, Mell, Frost, Laskowski, Aiello, Casey, Gutstein, Pucinski, Natarus, Oberman, Simpson, Schulter, Saperstein, Stone – 41.

Nays – None

Alderman Madrzyk moved to *Reconsider* the foregoing vote. The motion was *Lost*.

Chapter 147 of Municipal Code Amended Concerning Entertainment in Places Licensed to Sell Alcoholic Beverages.

The Committee on Police, Fire, Personnel, Schools and Municipal Institutions submitted the following report:

CHICAGO, JANUARY 11, 1978.

To the President and Members of the City Council:

Your Committee on Police, Fire, Personnel, Schools and Municipal Institutions, to which was referred (October 26, 1977) an Ordinance signed by mayor Michael A. Bilandic amending Chapter 147 of the Municipal Code of Chicago by adding a new section designated Section 147-16 which controls the form of entertainment in places licensed to sell alcoholic beverages, begs leave to recommend that your Honorable Body *Pass* the said proposed Ordinance which is transmitted herewith.

This recommendation was concurred in by 10 members of the Committee, with 1 dissenting vote.

Respectfully submitted,

(Signed) EDWARD M. BURKE,
Chairman.

On motion of Alderman Burke the proposed ordinance transmitted with the foregoing committee report was *Passed*, by yeas and nays as follows:

Yeas – Alderman Roti, Kenner, Sawyer, Wilinski, Humes, Adduci, Vrdolyak, Huels, Madrzyk, Burke, Barden, Shannon, Kellam, Joyce, Stewart, Lipinski, Rhodes, Marzullo, Zydlo, Ray, Washington, Hagopian, Keane, Gabinski, Mell, Frost, Laskowski, Aiello, Casey, Gutstein, Pucinski, Natarus, Schulter, Saperstein, Stone – 35.

Nays – Alderman Barnett, Lathrop, Cross, Oberman, Simpson – 5.

Alderman Madrzyk moved to *Reconsider* the foregoing vote. The motion was *Lost*.

The following is said ordinance as passed:

Be It Ordained by the City Council of the City of Chicago:

SECTION 1. The Municipal Code of the City of Chicago, Chapter 147, is hereby amended by adding a new section designated Chapter 147, Section 147-16 in Italics as follows below:

> *No person licensed under this chapter shall permit any employee, entertainer or patron to engage in any live act, demonstration, dance, or exhibition on the licensed premises which:*
>
> > *(a) Exposes his or her genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or*
> >
> > *(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, perineum, anal region or pubic hair region; or*
> >
> > *(c) Exposes any portion of the female breast at or below the areola thereof.*

SECTION 2. This ordinance shall be in full force and effect on and after due passage.

Chapter 192 of Municipal Code Amended Concerning Public Morals.

The Committee on Police, Fire, Personnel, Schools and Municipal Institutions submitted the following report:

CHICAGO, JANUARY 11, 1978.

To the President and Members of the City Council:

Your Committee on Police, Fire, Personnel, Schools and Municipal Institutions, to which was referred (October 26, 1977) an Ordinance signed by mayor Michael A. Bilandic amending Chapter 192, Section 192-8 of the Municipal Code of Chicago by rewriting it in order to bring it in compliance with recent decisions of the United States Supreme Court, begs leave to recommend that your Honorable Body *Pass* the said proposed Ordinance, *as amended* by your Committee, which is transmitted herewith.

This recommendation was concurred in by 10 members of the Committee, with 1 dissenting vote.

Respectfully submitted,
(Signed) EDWARD M. BURKE,
Chairman.

On motion of Alderman Burke the proposed ordinance *as amended* transmitted with the foregoing committee report was *Passed* by yeas and nays as follows:

Yeas – Alderman Roti, Kenner, Lathrop, Sawyer, Wilinski, Humes, Adduci, Vrdolyak, Huels, K[illegible]ak, Madrzyk,

Burke, Barden, Shannon, Kellam, Joyce, Stewart, Lipinski, Rhodes, Marzullo, Zydlo, Ray, Washington, Cross, Hagopian, Keane, Gabinski, Mell, Frost, Laskowski, Aiello, Casey, Gutstein, Pucinski, Schulter, Saperstein, Stone – 36.

Nays – Aldermen Barnett, Lathrop, Natarus, Oberman, Simpson – 5.

Alderman Madrzyk moved to *Reconsider* the foregoing vote. The motion was *Lost*.

* * *

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(6)

Supreme Court, U.S.
FILED
AUG 31 2007
OFFICE OF THE CLERK

No. 06-1614

IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Petitioners respectfully submit this brief as supplemental authority pursuant to Rule 15.8 of the Court's Rules.

On August 30, 2007, after Petitioners submitted their Reply Brief, the United States Court of Appeals for the Sixth Circuit issued a decision in *Hamilton's Bogarts, Inc. v. State of Michigan*, No. 06-1436, slip op. (6th Cir., Aug. 30, 2007) (attached hereto as Appendix 1). That court reversed a district court decision denying preliminary injunctive relief to bar enforcement of a state law regulating nude or topless dancing in establishments where liquor is sold. The Sixth Circuit held, *inter alia*, that remand was necessary to determine the appropriate standard of review and to evaluate whether the government had met the necessary burden of proof. *Id.* at 10a-13a.

The decision in *Hamilton's Bogarts, Inc.* addresses directly the first two questions raised in the instant Petition. The Sixth Circuit held that a reviewing court may not simply assume that a state regulation of erotic dancing where alcohol is served is content neutral, since the state "fails to even articulate what its interest is or how the regulations affect it." *Id.* at 13a. Some tangible demonstration of the government's purpose is necessary to permit the court to determine whether strict or intermediate scrutiny applies, and thus "is critical to [the law's] validity, as it has great bearing on the justifications the state must raise to defend the rules." *Id.* at 11a. The Sixth Circuit expressly rejected the state's claim of "broad discretion" to regulate establishments that sell alcohol as non-expressive conduct, *id.* at 9a-13a, contrary to both the Illinois Supreme Court's reasoning below (App. 17-19) and the City of Chicago's Opposition. Opp. at 9-11.

The Sixth Circuit also held that even where intermediate scrutiny is the applicable standard of review in a case such as this, the government's evidentiary burden "is not toothless" but instead "requires **some** showing of an important or substantial interest that the regulations are essential to address." *Id.* at 13a (emphasis in original). In this regard, when the government defends a regulation of speech "as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Id.* (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). Rather, it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

The decision underscores the need for Supreme Court guidance in this area, as the Sixth Circuit noted that the fractured opinion in *City of Erie v. Pap's AM*, 529 U.S. 277 (2000) "demonstrates the complicated nature of the analysis." *Hamilton's Bogarts, Inc.*, slip op. at 12a n.7. It also highlights

the divergent rulings among the various circuits on both the applicable First Amendment standard of review (Pet. at 15-17; Reply at 5) and the government's burden of proof with respect to purported secondary effects of adult entertainment. Pet. at 23-25; Reply at 7-9. This, along with other recent circuit court decisions issued since the Petition was filed (Reply at 8-9), illustrates the urgent need for clarification by this Court.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-1436

HAMILTON'S BOGARTS, INC.; KATHLEEN POLZIN,
Plaintiffs-Appellants,

v.

STATE OF MICHIGAN; MICHIGAN LIQUOR CONTROL COMMISSION; JENNIFER GRANHOLM; NIDA SAMON,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 06-10081—Julian A. Cook, Jr., District Judge

Argued: January 31, 2007
Decided and Filed: August 30, 2007

Before: MARTIN, BATCHELDER, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Timothy P. Murphy, St. Clair Shores, Michigan, for Appellants. Rosendo Asevedo, Jr., MICHIGAN LIQUOR CONTROL COMMISSION, Farmington, Michigan, for Appellees. ON BRIEF: Timothy P. Murphy, St. Clair Shores, Michigan, Michael L. Donaldson, Livonia, Michigan, for Appellants. Rosendo Asevedo, Jr., MICHIGAN LIQUOR CONTROL COMMISSION, Farmington, Michigan, for Appellees.

MARTIN, J., delivered the opinion of the court, in which McKEAGUE, J., joined. BATCHELDER, J. (p. 9), delivered a separate concurring opinion.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Plaintiffs Hamilton's Bogarts, Inc.—operator of an adult entertainment establishment with a Michigan liquor license—and Kathleen Polzin—an exotic dancer—brought this lawsuit to challenge a Michigan statute and regulations that prohibit entities with liquor licenses from allowing exotic dancers to perform fully nude, or mimick sexual acts, on stage. The district court denied plaintiffs' requests for injunctive relief. For the foregoing reasons, we REVERSE the district court's decision.

I.

On April 14, 1998, the Michigan legislature passed the challenged statute, which only appears relevant for its definition of the terms "topless" and "nudity[1]":

> As used in this section:
>
> (a) "Nudity" means exposure to public view of the whole or part of the pubic region; the whole or part of the anus; the whole or part of the buttocks; the whole or part of the genitals; or the breast area including the nipple or more than 1/2 of the area of the breast.
>
> (b) "Topless activity" means activity that includes, but is not limited to, entertainment or work-related activity performed by any of the following persons on the licensed premises in which the female breast area, including the nipple, or more than 1/2 of the area of the breast, is directly exposed or exposed by means of see-through clothing or a body stocking:

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[1] The statute was amended on December 16, 2005, but the amendment did not change the definitions of "topless" or "nudity."

(i) A licensee.

(ii) An employee, agent, or contractor of the licensee.

(iii) A person acting under the control of or with the permission of the licensee.

Mich. Comp. Laws § 436.1916 (15). The statute requires that holders of liquor licenses are required to obtain a permit from the state Liquor Control Commission before allowing topless activity to be performed,[2] but does not otherwise appear to prohibit nudity or topless activity on its own terms. The Commission had passed the following two rules in 1981 that specifically deal with such activity:

Mich. Admin. Code 436.1409 ("Rule 9"):

(1) An on-premise licensee shall not allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals or who displays other types of nudity prohibited by statute or local ordinance.

(2) An on-premises licensee shall not allow in or upon the licensed premises the showing of films, television, slides, or other electronic reproductions which depict scenes wherein any person exposes to public view the pubic region, anus, or genitals or displays other types of

---

[2] The statute's licensing requirement provides that:

[a]n on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for and been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95,000 or less.

Mich. Comp. Laws § 436.1916 (3).

> nudity prohibited by statute or local ordinance. This prohibition does not apply to any publicly broadcast television transmission from a federally licensed station.

Mich. Admin. Code 436.1411 ("Rule 11"):

> (1) An on-premise licensee shall not allow in or upon the licensed premises a person who performs, or simulates the performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus.
>
> (2) An on-premises licensee shall not allow in or upon the licensed premises the showing of films, television, slides, or other electronic reproductions which depict scenes wherein a person performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus. This prohibition does not apply to any publicly broadcast television transmission from a federally licensed station.

Plaintiffs brought this action under 42 U.S.C § 1983, alleging that the statute and rules violate the First, Fifth, and Fourteenth Amendments,[3] and requesting declaratory and injunctive relief. Plaintiffs moved for a preliminary injunction arguing that the statutes at issue were overbroad, void for vagueness, and in violation of the First Amendment. On February 13, 2006, the district court issued an order denying their claim for a preliminary injunction, based on its rejection of plaintiffs' likelihood of success on the merits.

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[3] The Fifth and Fourteenth Amendment claims were based on alleged due process violations (despite the fact that the Fifth Amendment only prohibits due process violations by the federal government). On appeal, plaintiffs appear to primarily rely on the First Amendment claim, although they include reference to the Fifth Amendment in their void for vagueness argument. Because the case involves state law, the reference should be to the Fourteenth Amendment's due process clause, to the extent due process is a necessary component of a void for vagueness argument.

II.

This Court normally reviews a district court's decision regarding a preliminary injunction for an abuse of discretion. *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 888 (6th Cir. 2000) (*overruled on other grounds*, *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774, 784 (2004)). Four factors must be considered and balanced by the district court in making its determination: "(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief." *Id.* "'The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.'" *Id.* (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

The Court explained in *Nightclubs, Inc.* that in a First Amendment case, "the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because, as in this case, the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the statute." *Id.* (citations omitted). Here, the likelihood of success on the merits is primarily a legal question, and there is little or no factual dispute. Thus, even though the district court's denial of injunctive relief is generally reviewed for an abuse of discretion, because the issue before us is limited to the purely legal question of whether the district court "improperly applied governing law or used an erroneous legal standard," we review the district court's decision *de novo*. *See Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003) (under the abuse of discretion standard in the context of a preliminary

injunction, "we must review the district court's legal conclusions *de novo* and its factual findings for clear error").

A. Preclusion and Void for Vagueness

At the outset, the state suggests in its brief that the doctrine of res judicata (or claim preclusion) should bar the plaintiffs' action here in light of a prior suit that Hamilton's Bogarts brought challenging the Liquor Control Commission's Rule 11 after it was ticketed numerous times for violating the rule. In that action, heard by this Court on appeal, Bogarts challenged the Rule as unconstitutionally vague, which it again does here. *See Hamilton v. Roberts*, 165 F.3d 27 (Table), 1998 WL 639158, at *6-7 (6th Cir., Sept. 10, 1998) (unpublished opinion). This Court upheld the district court's rejection of this challenge at summary judgment, ruling that the provision was not vague whatsoever. Id.

In this argument, the state appears to confuse the doctrines of res judicata and collateral estoppel (issue preclusion). The state argues that "[t]his Court's prior determination in *Hamilton v. Roberts*, that Liquor Control Commission Rule 11 was not void for vagueness is *res judicata* as to Appellants' identical First Amendment challenge to that rule in this case." Appellees' Br. at 15. We "may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). In contrast, when considering the preclusive effect of a state court judgment, we must look to the law of that state. *Id.; see also* 28 U.S.C. § 1738. Because the judgment upon which the State relies for its preclusion argument was issued by a federal court, we look to federal law to determine its preclusive effect. This Court has described res judicata as "extinguish[ing] 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.'" *Walker v. General Tel. Co.*, 25 F. App'x 332, 336

(6th Cir. 2001). The broad sweep of res judicata is likely inapplicable here, as one of the required elements is that the issues raised in the subsequent action were raised or should have been raised in the first lawsuit. *Id.*[4] Here, although Rule 11 was challenged in the first lawsuit, Rule 9 was not, presumably because it was only Rule 11 under which Bogarts was penalized at the time. The state has not argued or made any showing that Bogarts should also have challenged Rule 9 at the time. Because the current suit also includes additional challenges to both Rules beyond void for vagueness claims, it would be inappropriate to apply res judicata to the plaintiffs' claims in their entirety.

Even so, the related and narrower doctrine of collateral estoppel may well affect the void for vagueness claim that has already been litigated. This Court has listed four requirements for the application of collateral estoppel:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

NAACP, Detroit Branch v. Detroit Police Officers Ass'n (DPOA), 821 F.2d 328, 330 (6th Cir. 1987). Because collateral estoppel precludes future litigation of one specific issue, and because that is what the state effectively asks us to find,

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[4] The elements of res judicata are, in their entirety, that "(1) there is a final decision on the merits of the first action by a court of competent jurisdiction; (2) the second action involves the same parties, or their privies, as the first; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) there is identity of claims." *Walker v. General Tel. Co.*, 25 F. App'x 332, 336 (6th Cir. 2001).

we construe their argument as one for collateral estoppel rather than res judicata, despite the substitution of one term for the other in the state's brief.[5]

The void for vagueness challenge to Rule 11 meets all four of the requirements for collateral estoppel, as it was actually litigated in the prior case, it was essential to the holding that Rule 11 was constitutional, there was a final judgment on the merits, and so far as we can tell, the plaintiffs had a full and fair opportunity to litigate the issue. With regard to the fourth element, the plaintiffs fail to address the preclusion issue at all in their brief, giving us little reason to conclude otherwise. Further, although Polzin was not a named party in the first suit, this Court has stated that collateral estoppel extends to "privies" of the party to the first lawsuit. *Verizon North Inc. v. Strand*, 367 F.3d 577, 583 (6th Cir. 2004); *see also Evans v. Pearson Enter., Inc.*, 434 F.3d 839, 850 n.5 (6th Cir. 2006) (stating that employee who shares interest in litigation with his employer is in privity with employer for collateral estoppel purposes). Because Polzin has an employment relationship with Bogarts, shares a common legal interest in the outcome of this claim with Bogarts, and has presented us with no argument as to why she should not be precluded based on her employer's prior litigation of an identical claim, we conclude that collateral estoppel can apply against both plaintiffs here with respect to the void for vagueness challenge to Rule 11.

Although the vagueness challenge to Rule 9 was not actually litigated, and therefore cannot be collaterally estopped, the prior panel's rationale provides persuasive authority for rejecting the void for vagueness challenge to Rule 9. *See Hamilton*, 1998 U.S. App. Lexis 22653, at * 21 ("[T]here can be no doubt as to what conduct the rule prohibits."). If anything, Rule 9 is less vague than Rule 11, as it specifically defines body parts that cannot be exposed in a licensed

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[5] Latin is a dead language anyway.

premises. Plaintiffs seize on the words "other type of nudity" used in Rule 9. On its own, this term could well be considered vague, but the full clause in which it is used makes clear that in addition to the Rule's independent prohibitions, it also prohibits "other types of nudity prohibited by statute or local ordinance." Thus, the clause in question would appear to simply seek to avoid preempting the application of any other state laws or local ordinances that ban nudity. Even if it might be confusing that nudity is governed by more than one statute or ordinance, this provision does not make Rule 9 itself vague, as the nudity it prohibits is fairly well defined. If there are indeed other statutes or local ordinances that prohibit nudity and are incorporated into this rule, plaintiffs' would have to at least identify them for us before we can say that they are vague. For these reasons we affirm the district court's rejection of the plaintiffs' void for vagueness argument with respect to both rules.

B. Plaintiffs' First Amendment Challenge

1. *Implications of the Twenty-First Amendment*

In rejecting the plaintiffs' First Amendment claim, the district court relied on *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981) and *California v. LaRue*, 409 U.S. 109 (1972). D. Ct. Op. at 6, 8. The rationale of these cases was that under the authority granted to the states in the Twenty-first Amendment to regulate liquor sales, a state could prohibit nude dancing in places where liquor is sold. The state relies almost entirely on this reasoning here. Unfortunately for the state, the Supreme Court has entirely abandoned this rationale for upholding regulations that raise First Amendment concerns in places where alcohol is sold. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996) ("Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment. As we explained in a case decided more than a decade after *LaRue*, although the Twenty-first Amendment limits the

effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.' . . . . Accordingly, we now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."); *see also Odle v. Decatur County*, 421 F.3d 386, 398 (6th Cir. 2005) ("*LaRue*'s rationale is no longer good law."). Because the *Bellanca* case relied on the same constitutional justifications as LaRue, the subsequent decision in *Liquormart* abrogated its reasoning as well.

In reaffirming the **holding** of *LaRue*, the *Liquormart* Court stated that "the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." 517 U.S. at 515. Thus, a state is allowed implement restrictions on nude dancing to combat the "secondary effects" that are likely to arise from the combination of liquor and nude dancing. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 293, 296-97 (2000). Although liquor consumption may well be a valid factor in a state's consideration of secondary effects, it is no longer correct to argue that the Twenty-first Amendment provides greater authority to regulate expressive conduct wherever liquor is sold.

2. *Content based or content neutral?*

The Supreme Court has stated that "nude dancing . . . is expressive conduct," while nudity itself is not. *Id.* at 289. As a result, laws that limit nude dancing are subject to First Amendment scrutiny under one of two alternative standards of review. If "the governmental purpose in enacting the regulation is unrelated to the suppression of expression," then the law need only satisfy the intermediate scrutiny inquiry from

United States v. O'Brien, 391 U. S. 367 (1968). *Pap's A.M.*, 529 U.S. at 289. If, on the other hand, the "government interest is related to the content of the expression, . . . then the regulation falls outside the scope of the O'Brien test and must be justified under a more demanding standard." *Id.* Thus, under the Supreme Court's precedent, the threshold question is whether the regulations here are content based i.e. are they spicifically directed at nude dancing—or do the terms of the regulations target conduct alone. *Id.*[6]

The distinction between content-based and content-neutral regulations is critical to their validity, as it has great bearing on the justifications the state must raise to defend the rules. Where a regulation is content-based, it is "considered presumptively invalid and subject to strict scrutiny." *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 434 (2002). To satisfy the strict scrutiny inquiry in the context of the First Amendment "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). On the other hand, under *Pap's A.M.*, content-neutral restrictions must meet the four-part intermediate scrutiny test from *O'Brien*, which requires a showing that 1) the regulation is within the constitutional power of the government to enact, 2) the regulation furthers

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[6] The Supreme Court plurality applied this approach in *Pap's A.M.* as follows: "The ordinance here, like the statute in Barnes, is on its face a general prohibition on public nudity. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." 529 U.S. at 290 (discussing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (citations omitted)).

an important or substantial government interest, 3) the government interest must be unrelated to the suppression of free expression, and 4) the restriction must be no greater than is essential to the furtherance of the government interest. *Pap's A.M.*, 529 U.S. at 296-301.

Unfortunately, instead of addressing whether the regulations are content-based or content-neutral and articulating any state interest that is furthered by the regulations, the state merely relies on its "broad discretion" under *LaRue*. As a result of this approach we have very little guidance in analyzing the relevant factors. We do not doubt that it is within the state's police power to pass a nudity ban, to regulate places where liquor is sold, and to combat secondary effects that might be related to adult entertainment. But we are left to guess about the governmental interest at stake and how it is advanced by Rules 9 and 11,[7] not to mention the critical question of which standard governs this case.

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[7] Nor are these inherently straightforward questions that we would somehow be suited to address on an undeveloped record. The Supreme Court's opinion in *Pap's A.M.* demonstrates the complicated nature of the analysis. Although five Justices voted to uphold the regulation in *Pap's A.M.*, two of them, Justices Scalia and Thomas, relied primarily on their determination that the case was moot and that the plaintiff lacked standing, reasoning alternatively that the city could ban nude dancing based on a determination that it was immoral, without facing First Amendment limitations. 529 U.S. at 310 (Scalia, J., concurring). As a result, only a plurality of four Justices applied the O'Brien intermediate scrutiny test, and found that the regulation met its requirements. Justice Souter, writing in dissent, agreed that this test applied, but disagreed that the city met its burden, due to a dearth of evidence regarding "the harm [the city] claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed." *Id.* at 313 (Souter, J., dissenting). There thus appears to be a difference in the evidentiary standard that the plurality and Justice Souter would require, with the plurality endorsing the government's reliance on prior judicial opinions that addressed secondary effects, and the findings expressed by the Erie City Council in its preamble to the ordinance. *Id.* at 296-298.

Assuming arguendo that the lesser standard of intermediate scrutiny applies, it would not be a difficult one to meet, but it is not toothless, and requires **some** showing of an important or substantial interest that the regulations are essential to address. *Turner Broad. Sys. v. FCC*, 512 U. S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. " (citation omitted)). Yet not only does the state fail to produce any evidence regarding secondary effects or the impact of its rule, but it fails to even articulate what its interest is or how the regulations affect it.

There are alternative, valid reasons to view the regulations in question here under either standard, but we need not address this threshold question because the state has advanced no relevant governmental interest and made no showing as to how Rules 9 and 11 advance such an interest. The Rules therefore cannot survive either strict or intermediate scrutiny. Accordingly, because the plaintiffs have made the requisite showing of success on the merits, a preliminary injunction should issue.

C. Overbreadth and Balancing of the Harms

Plaintiffs raise two final arguments, that the Rules are impermissibly overbroad in violation fo the First Amendment and that the district court improperly balanced the harms to them and to the public against those of the government in denying them a preliminary injunction. While we note that plaintiffs' appear to have a stronger case for overbreadth than even the plaintiffs in *Odle* and *Triplett Grill, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), where we held the statutes at issue would proscribe expressive conduct in theatrical and other types of performances which there is no

reason to believe had any negative secondary effects and were therefore impermissibly overbroad, it is not necessary for us to engage in an in-depth analysis of plaintiffs' overbreadth and balancing of the harms arguments in light of our holding above.

III.

We hold that preliminary injunctive relief is necessary in this case. Of course the proceedings rgmain in the preliminary stages, and hopefully the case will be litigated differently after remand.[8] Accordingly, we REVERSE the district court's denial of plaintiffs' motion for preliminary injunction, and REMAND with instructions to grant plaintiffs' motion and issue a preliminary injunction.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, concurring. I concur in Judge Martin's opinion. I write separately only to express my suspicion that, like the reports of Mark Twain's death, *see The New Dictionary of Cultural Literacy* (Third Edition, 2002), the report of the death of Latin in the majority opinion's footnote 5 is greatly exaggerated.

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[8] It is also worth noting that the state itself is not a properly named defendant, as it is shielded from suit under the doctrine of sovereign immunity. States are protected by the Eleventh Amendment even from suits brought under section 1983, because the statute only creates a cause of action against a "person" who causes the deprivation of another's Constitutional rights. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Suits against state officials in their official capacity for money damages are similarly barred, as a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Id.* The same is not true for suits seeking only injunctive relief: "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

(4)

No. 06-1614

FILED

AUG 13 2007

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's review is warranted, given that the Illinois Supreme Court applied settled law to hold that a Chicago ordinance prohibiting nude and seminude dancing at liquor-licensed establishments is subject to intermediate scrutiny because the ordinance was aimed not at suppressing expression but at combating the potentially harmful secondary effects created when sexually explicit entertainment is combined with alcohol.

2. Whether this Court's review is warranted, given that the Illinois Supreme Court applied settled law to hold that the challenged ordinance satisfies intermediate scrutiny because Chicago relied on evidence that is "reasonably believed to be relevant" for demonstrating a connection between strip clubs that serve alcohol and an increase in crime.

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On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Pooh Bah Enterprises, Inc. ("Pooh Bah"), holds a Chicago liquor license entitling it to serve alcohol at its nightclub, located at 1531 North Kingsbury Street in the City of Chicago. Pet. App. 2. In addition to serving alcohol, this so-called "gentleman's club" provides sexually oriented entertainment featuring female dancers who remove their clothes while they dance. *Id.* at 2 & n.1. Chicago does not prohibit nude and seminude dancing at clubs within the City but does prohibit the sale of alcohol in combination with such dancing. *Id.* at 46. Pooh Bah's club is the only commercial establishment that combines the sale of liquor by the drink and dancing by seminude women. *Id.* at 5. Alcohol sales are a major source of the club's income, which is substantial. *Id.* at 7. In 2000, the club's gross revenue was $7 million. *Ibid.* By

comparison, strip clubs in Chicago that do not serve alcohol had annual revenues of only $1-2 million. *Ibid.*

Pooh Bah's entertainment has been the same since 1993, when these proceedings first began. Pet. App. 10. Patrons sit at tables, from where they can order drinks while watching dancers perform. *Id.* at 7. The dancers take off their clothes while dancing to prerecorded music, *id.* at 6-7, and, by the end of the striptease, the only item of clothing the dancers still have on is a thong, *id.* at 9.[1] The thong does not cover the dancers' buttocks. *Ibid.* The dancers are topless except for a skin-colored latex makeup substance on their nipples and areolae. *Ibid.* At most, the latex merely obscures the naturally darker color of that portion of the dancers' breasts; the breasts otherwise appear nude. *Ibid.*[2]

The dancers perform either on a stage or by doing "table dances." Pet. App. 6-8. A table dance is a brief striptease performed at the customer's table for an additional fee. *Id.* at 8. During table dances, the dancers may lick their fingers, rub and fondle their breasts, and expose their pubic region, including their labia. Tr. 90-93, 133, 160-61, 180, 1405-06, 1425. In addition, although club policy forbids physical contact with customers, the record discloses that dancers have sucked on customers' earlobes and kissed customers on the cheek during table dances. Pet. App. 8.

In 1993, Chicago's Liquor License Control Commission ("LLCC") commenced proceedings to revoke Pooh Bah's

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[1] A thong—also called a "T-bar"—is a bikini bottom that covers the pubic area, with a small waistband and a thin strip of material in the back that descends downwards through the cleft of the buttocks where it connects to the front piece through the legs. Pet. App. 9.

[2] There was extensive testimony that the latex was applied only to the nipples and areolae, and not to the sides and lower part of the breasts, and, moreover, that the color and texture of the nipples and areolae were visible through the latex. Pet. App. 9-10.

liquor and other municipal licenses based on charges that the dancers at its club exposed their buttocks and breasts in violation of Chicago's Municipal Code. Pet. App. 2, 10-11. The Code prohibits a liquor-licensed establishment from permitting "any live act, demonstration, dance or exhibition . . . which exposes to public view . . . genitals, pubic hair, buttocks . . . or [a]ny portion of the female breast at or below the areola." Municipal Code of Chicago, Ill. § 4-60-140(d) (1999) ("the alcohol ban"). The Code further provides that, for purposes of the alcohol ban, these body parts are considered to be exposed to public view if they are "uncovered or [are] less than completely and opaquely covered." *Id.* On October 15, 1993, after an evidentiary hearing, the LLCC revoked Pooh Bah's licenses. Pet. App. 11. Pooh Bah appealed to the License Appeal Commission, which affirmed and denied rehearing. *Ibid.*

Pooh Bah sought judicial review pursuant to the Illinois Administrative Review Law, see 735 ILCS 5/3-101 (2004) *et seq.* Pet. App. 11. Revocation of Pooh Bah's municipal licenses was stayed during this review, as well as the resolution of a lawsuit Pooh Bah had filed seeking a declaration that the alcohol ban is unconstitutional. *Id.* at 11-12. These proceedings were protracted, and Pooh Bah operated its strip club throughout the 1990s. *Id.* at 13. Meanwhile, in 1999, after further investigation of activities at Pooh Bah's club, the City filed a lawsuit alleging that the club constituted a public nuisance and seeking injunctive relief and fines. *Ibid.* The administrative review and nuisance cases were consolidated in the circuit court and went to trial.

At trial, the City presented 15 witnesses, and Pooh Bah presented 13. The witnesses testified not only about the entertainment presented at Pooh Bah's club, but also about the effect that establishments like Pooh Bah's may have on the

surrounding community.[3] In particular, the City presented the testimony of Police Officer Roger O'Brien, who had served in the City's 18th District Vice Unit since 1979. Pet. App. 6. Officer O'Brien stated that the 18th District covers the Rush Street area in Chicago, and that during the late 1970s and mid-1980s, there were approximately 12 or 13 strip clubs that served alcohol located in that area. *Ibid.* At that time, prostitutes could be found on every corner in the Rush Street area, and waitresses and dancers frequently solicited customers for sex inside the clubs. *Ibid.* In the 1980s, the City engaged in anti-prostitution efforts that ultimately resulted in the closure of these establishments. *Ibid.* According to Officer O'Brien, there has been an 80% decrease in prostitution arrests in the Rush street area since the strip clubs selling alcohol were shut down. *Ibid.*

Thomas Smith, Assistant Commissioner for Zoning in the City's Department of Planning and Development, testified for the City, and stated that, in his opinion, there is a relationship between sexually oriented businesses and an increase in crime. Pet. App. 33-34. In formulating this opinion, Assistant Commissioner Smith relied on his experience as an urban planner, and also on research he had undertaken when he was preparing recommendations to Chicago's City Council for amendments to the City's ordinances relating to so-called adult businesses. *Id.* at 33-34, 39. Assistant Commissioner Smith's research disclosed that, historically, the Chicago neighborhoods in which these businesses—including strip clubs where liquor was served—were located had significant

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[3] Contrary to petitioners' contention, Pet. 9, the City did not "abandon[]" its claim that the dancers' breasts are not opaquely covered during the trial. Rather, the City produced extensive evidence that the dancers' skimpy latex coverings left their areolae visible. Pet. App. 9-10. Respondents' position was and is that the latex covering does not comply with the ordinance because it does not disguise either the color or the texture of the areola, and is not applied to the breasts at or below the areola.

problems with criminal activity, particularly prostitution. *Id.* at 33. Assistant Commissioner Smith also consulted with groups such as the American Planning Association and the National Institute of Municipal Officers, and obtained and reviewed numerous studies conducted by other cities, including Indianapolis, Los Angeles, Minneapolis, Phoenix, and St. Paul. *Id.* at 34. These studies found that incidents of sex and property crimes were significantly greater in areas with sexually oriented businesses, compared to areas without these businesses. *Ibid.* In particular, some studies identified a specific relationship between the combination of alcohol sales and adult uses and the incidence of neighborhood crime. *Ibid.*

Dr. Allen Kodish, a psychiatrist and a faculty member at the University of Chicago, testified for the City and discussed the effects of combining alcohol with sexual stimulation. Pet. App. 38. He stated that alcohol facilitates sexual and aggressive impulses; impairs social judgment; and, when combined with sexual stimulation, produces an effect "associated with an increase in violent sexual acting out, acts of criminal behavior." *Ibid.* Dr. Kodish explained that the combination of alcohol and sexual stimulation overrides the normal brakes or checks people place on themselves to avoid inappropriate or dangerous behavior. Tr. 871. Thus, drinking alcohol while viewing naked or nearly naked dancers increases the likelihood that a person will act on various anti-social impulses, such as touching, screaming, and engaging in fights or other risky behavior. Pet. App. 38.

The City also adduced testimony from Dr. Wesley Skogan, a professor of political science at Northwestern University and a member of the University's Institute for Policy Research. Pet. App. 38. Dr. Skogan discussed a number of studies and articles showing that establishments that serve alcohol attract a significant amount of crime. *Id.* at 38-39. He explained that such establishments create an opportunity

for crime by bringing the potential victim and criminal together. *Id.* at 38. The victims become more vulnerable because of alcohol's disorienting effects, creating an attractive situation for potential offenders. *Id.* at 39. One of the studies showed that the combination of retail alcohol sales and adult uses created a higher incidence of crime than retail alcohol sales or adult uses operating in isolation. *Ibid.*

Pooh Bah cross-examined the City's witnesses and presented its own witnesses, including experts. Pierre DeVise ("DeVise"), a self-employed consultant retained by Pooh Bah, testified that he was not aware of any studies showing a cause-and-effect relationship between liquor establishments featuring semi-naked dancers and crime. Pet. App. 41. But he admitted that a correlation has been shown to exist between sexually oriented establishments that serve alcohol and crime. *Ibid.* DeVise stated that the study from Minneapolis (relied upon by Assistant Commissioner Smith) was excellent and by far one of the best he had seen. Tr. 2813. That study showed such businesses to be significantly related to higher crime rates. Tr. 2814.

Peter Girandola, an assistant professor of psychology at the University of Kentucky, also testified for Pooh Bah. Pet. App. 41. He opined that there are no studies showing a direct, positive relationship between viewing sexual stimuli and sexual "acting out" behavior in men, *ibid.*, but, during cross-examination, he acknowledged that studies had shown mild increases in sexual arousal in men with low levels of alcohol when they viewed erotic slides, Tr. 2484. Professor Girandola also agreed that at least one study had shown higher numbers of murders, rapes, robberies, assaults, and burglaries in areas with taverns or lounges than in areas without such establishments, Tr. 2654-57, and, moreover, that his own studies had confirmed that alcohol consumption is related to a higher level of aggression, Pet. App. 41; that a person who had been drinking might take risks that he

otherwise would not take. Tr. 2697-98; and that some men might get more violent upon drinking alcohol. Tr. 2699-700.

Rolf Campbell ("Campbell"), a planning and zoning consultant for Pooh Bah, gave his opinion that the club did not have a "negative impact on the orderly development of the immediately surrounding properties." Pet. App. 41. During cross-examination, however, Campbell admitted that he had no opinion about the relationship between land use and crime, nor had he conducted research on the relationship between either alcohol or sexually oriented businesses and crime. *Ibid.*

Based on this and other evidence, the trial court issued a memorandum opinion and order in January 2001, denying the City's request for injunctive relief and declaring the alcohol ban unconstitutional because it infringed on protected rights of expression. Pet. App. 133-54.[4] In particular, the trial court held that although the City is allowed "to enact ordinances that combat secondary effects," and, moreover, that "the City was successful in . . . positing the possibility that those secondary effects could hypothetically exist" in this case, the alcohol ban nevertheless did not pass constitutional muster because "the record [was] devoid of any proof of the existence of even potentially harmful secondary effects." *Id.* at 147-48. On appeal, the Illinois Appellate Court held that the trial court had misapplied the law, noting that the First Amendment does not require the City "to show results from a specific study around the vicinity of the Club" to justify its secondary effects rationale; instead, the City could rely on any evidence it "reasonably believes . . . is relevant to the problem the City wishes to address." *Id.* at 113. Because the

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[4] The trial court also held that the alcohol ban is impermissibly vague and overbroad. Pet. App. 148-50. These rulings were reversed on appeal, *id.* at 116-20, and the Illinois Supreme Court upheld that reversal, *id.* at 48-60. Petitioners do not challenge these rulings in their petition, and, accordingly, such challenge is waived. See Sup. Ct. R. 14(a).

City had provided such evidence, the appellate court reversed the judgment of the trial court and upheld the ordinance. *Id.* at 124. The Illinois Supreme Court affirmed, *id.* at 63, and denied rehearing, *id.* at 64.

ARGUMENT

Petitioners identify two reasons they claim this Court's review is warranted. First, petitioners contend that there is uncertainty among the state and federal courts about the appropriate level of First Amendment scrutiny that is applicable where, as here, a local government bans nude and seminude dancing at liquor-licensed establishments to combat the potentially harmful secondary effects of combining sexually explicit entertainment and alcohol. Second, petitioners insist that, regardless of the applicable level of scrutiny, the City's ordinance violates the First Amendment because the trial court found no evidence of negative secondary effects at Pooh Bah's club—even though that court acknowledged that "those secondary effects could hypothetically exist." Pet. App. 147. The Illinois Supreme Court applied settled law and correctly resolved both issues. Accordingly, both because the court's judgment fully comports with this Court's decisions and because this case raises no issue on which judicial decisions conflict, the petition for writ of certiorari should be denied.[5]

1. Since 1993, Pooh Bah has sold alcoholic drinks to its patrons while providing entertainment consisting of dancing by women wearing nothing more than thongs and latex-

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[5] In the "Questions Presented," petitioners also suggest a third question: whether the "First and Fourteenth Amendments" require a remand to the trial court "for further evidence." Pet. (i). We do not address due process separately because petitioners' one-paragraph argument in support of this claim, see *id.* at 23, can only be described as cursory. In any event, as we explain in Part 2.c, petitioners waived this argument when they failed to make it before the Illinois Supreme Court.

covered nipples and areolae. Pet. App. 10. Notably, Chicago's Municipal Code does not prohibit women from dancing for customers in this state of undress. *Ibid.* Throughout the period at issue here, establishments have been permitted to operate in Chicago that provide entertainment by dancers who wear less, and, indeed, even appear in a state of nudity. *Id.* at 10, 31. Thus, as the Illinois Supreme Court discerned, Chicago's ordinance "does not . . . forbid any speech or expressive conduct. . . . This ordinance merely prohibits [nude or seminude dancing] from being combined with the sale and consumption of alcohol." *Id.* at 54. Had the City wanted to suppress the expressive conduct associated with such performances, surely it would have directed its regulation to the dancing itself. But the alcohol ban merely regulates the sale of liquor at sexually oriented establishments.

a.i. On just this basis, numerous courts have rejected constitutional challenges akin to the one petitioners forward, upholding laws like section 4-60-140(d) because they regulate liquor sales and not the dancers' attire, much less the content of their expression. For example, in *181 South Inc. v. Fischer*, 454 F.3d 228 (3d Cir. 2006), the Third Circuit held that a state law prohibiting "lewdness or immoral activity" on liquor-licensed premises —and applied to bar sexually explicit dancing—"is not a restriction of erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) on premises where such expression takes place." *Id.* at 234 (internal quotations and citation omitted). Similarly, the Seventh Circuit explained in *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), that "[t]he question is not whether the Village can require nude dancers to wear more attire than pasties and G-strings, but whether it can prohibit Sexually Oriented Businesses like Ben's Bar from selling alcoholic beverages . . . ." *Id.* at 708. Myriad other cases are to the same effect, rejecting a First Amendment challenge to a state or local law banning nude and seminude dancing in liquor-licensed establishments. See, *e.g.*,

G.M. Enterprises, Inc. v. Town of St. Joseph, 350 F.3d 631, 636-40 (7th Cir. 2003); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 607-08 (8th Cir. 2001); *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308-09 (11th Cir. 2000) (per curiam); *Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County*, 217 F.3d 1360, 1363-65 (11th Cir. 2000); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996-99 (11th Cir. 1998); *McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124, 134-40 (N.D. 2007); *Purple Orchid, Inc. v. Pennsylvania State Police*, 813 A.2d 801, 806-13 (Pa. 2002); *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1234-38 (R.I. 2000); *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 355-57 (Ga. 1997); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 121 Cal. Rptr. 2d 729, 734-41 (Cal. Ct. App. 2002); *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324, 333-37 (Tenn. Ct. App. 2000); *Urmanski v. Town of Bradley*, 613 N.W.2d 905, 907-11 (Wisc. Ct. App. 2000).[6]

ii. These holdings flow inexorably from this Court's cases, which have consistently upheld laws restricting nude or seminude dancing on premises licensed to serve alcoholic beverages. See *City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (per curiam); *California v. LaRue*, 409 U.S. 109, 118-19 (1972).[7] At the same time,

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[6] The argument forwarded by petitioners' amici flows from the proposition that the First Amendment analysis "is the same whether alcohol is involved or not." Brief Amici Curiae in Support of Petition for Writ of Certiorari at 2. This is incorrect. Laws regulating liquor sales at sexually oriented businesses do not restrict expression. For this reason, we declined to consent to the filing of the amicus brief.

[7] These cases reflect the view that the broad powers of the states to regulate the sale of liquor pursuant to the Twenty-First Amendment outweigh any First Amendment interest in nude and seminude dancing, and states therefore have the authority to ban such dancing as a part of

the Court has held that sexually explicit entertainment is entitled to only diminished protection under the First Amendment. See, *e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (nude dancing "falls only within the outer ambit of the First Amendment's protection"); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (same). Indeed, "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49 (1986) (footnote omitted).

In *Renton*, for example, the Court upheld an ordinance prohibiting theaters offering sexually explicit films from locating in most areas of the city. The Court concluded that even though this ordinance treated such theaters "differently from other kinds of theaters," 475 U.S. at 47, it was a valid time, place, and manner restriction because the ordinance was "aimed not at the *content* of the films . . . but rather at the *secondary* effects of such theaters on the surrounding community," *id.* (emphasis in original). See also *Young v. Ameri-*

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their liquor licensing programs. See *Iacobucci*, 479 U.S. at 95; *Bellanca*, 452 U.S. at 718; *LaRue*, 409 U.S. at 118-19. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court altered its view of the interplay between the First and Twenty-First amendments, holding for the first time that "the Twenty-First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *Id.* at 516. Notably, however, although the Court disavowed the reasoning employed in *LaRue* and its progeny, the Court also made clear that, "[e]ntirely apart from the Twenty-First Amendment," state and local governments have "ample power to prohibit the sale of alcoholic beverages at inappropriate locations," such as strip clubs. *Id.* at 515. Accordingly, the Court held that its "analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-First Amendment." *Id.*

can Mini Theaters, Inc., 427 U.S. 50, 70-71 & n.34 (1976) (plurality opinion) (City of Detroit could "legitimately use the content of [sexually explicit movies] as the basis for placing them in a different classification from other motion pictures."). Thus, *Renton* establishes that laws targeting businesses offering sexually oriented expression because of its "undesirable secondary effects" will be treated as content neutral and subject to intermediate rather than strict scrutiny. 475 U.S. at 48-49. The Court reaffirmed this approach as recently as *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), where it applied the intermediate scrutiny of the time, place, and manner test to a zoning ordinance applicable only to sexually explicit entertainment.[8]

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[8] Although a majority of the Court in *Alameda Books* did not agree on a single rationale for its decision, there is a majority for intermediate scrutiny. See 535 U.S. at 438 (plurality opinion); *id.* at 448 (Kennedy, J., concurring in the judgment).

Petitioners' cases, Pet. 15, do not require more rigorous scrutiny. In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the statute was not directed at secondary effects, but "focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners." *Id.* at 811 (emphasis in original) (citation and internal quotations omitted). The Court expressly distinguished cases like *Renton*, where the regulation is aimed at adverse secondary effects. See *id.* at 815.

Boos v. Barry, 485 U.S. 312 (1988), is even farther afield. That case concerned "*political speech* in a *public forum*," *id.* at 321 (emphasis in original)—not sexually explicit dancing. And, as in *Playboy*, the law was not justified by reference to secondary effects; it was enacted solely to "protect[] the dignity of foreign diplomatic personnel." *Id.* at 322. Moreover, the statement petitioners cite, see Pet. 15, did not command a majority of the Court, and even these Justices agreed that the law at issue did not fall within *Renton* because it was not aimed at combating negative secondary effects. See *id.* at 320-21 (O'Connor, J., joined by Scalia, J., and Stevens, J.).

Finally, in *Pap's*, the Court expressly reaffirmed the holding in *Renton* that laws regulating businesses offering sexually oriented entertainment are considered content neutral and subject to intermediate scrutiny if

Petitioners have identified only two cases—*Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007), and *G.Q. Gentleman's Quarters, Inc. v. City of Lake Ozark*, 83 S.W.3d 98 (Mo. Ct. App. 2002)—in which a restriction on sexually explicit dancing at liquor-licensed establishments was struck down. But even these cases recognize that intermediate scrutiny governs laws directed at negative secondary effects. The court in *Illusions-Dallas* invalidated the law at issue because it flunked this test. See 482 F.3d at 311-15. In *G.Q.*, the court found "no evidence" that the challenged ordinance was aimed at combating negative secondary effects. 83 S.W. 3d at 103. On that basis only, the court applied strict rather than intermediate scrutiny. See *id.* Thus, rather than indicate a conflict, these cases confirm that intermediate scrutiny applies to a regulation of sexually explicit entertainment based on potentially harmful secondary effects.

iii. The Illinois Supreme Court followed this approach to the letter. The court applied intermediate scrutiny because the evidence showed that "combating the negative secondary effects caused by adult entertainment establishments was not only the predominate motive for the City's actions, it was the only motivation." Pet. App. 35. See also *id.* at 26 n.12, 31-36. As the court correctly recognized, this evidence included the legislative preamble to the 1993 adult use ordinances, where Chicago's City Council expressly explained its concerns about the deleterious effects sexually oriented businesses may have on the surrounding community. *Id.* at 32-33. In addition, the court considered the testimony of

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justified by reference to their secondary effects. See 529 U.S. at 283, 291 (plurality opinion); *id.* at 310 (Souter, J., concurring in part and dissenting in part). Even the dissenters agreed with the majority on this point. See *id.* at 319-21 (Stevens, J., joined by Ginsburg, J., dissenting). Indeed, the only Justices who diverged from this view would have upheld the ban on nude dancing even without a secondary effects justification. See *id.* at 310 (Scalia, J., joined by Thomas, J., concurring in the judgment).

Assistant Commissioner Smith, who described his research into Chicago's past problems with strip clubs selling alcohol and the experiences of other municipalities, and his conclusion that such clubs are associated with higher crime rates, *id.* at 33-34, 39; as well as the testimony of veteran Police Officer O'Brien, who detailed "the abundance of criminal activity" associated with these clubs, *id.* at 39. The court also reviewed Dr. Kodish's expert opinion that the combination of adult entertainment and alcohol "produces an effect associated with an increase in violent sexual acting out, acts of criminal behavior," *id.* at 38; and Professor Skogan's that not only do liquor establishments attract a significant amount of crime, *ibid.*, but the combination of retail alcohol sales and adult entertainment creates an even "higher incidence of crime than resulted from retail alcohol sales or adult uses operating in isolation," *id.* at 39. Finally, the court noted that the ordinance does not prohibit nude or seminude dancing outright; it merely prohibits the sale of alcohol at establishments that offer such entertainment, *id.* at 36—proof enough that the ordinance is not aimed at suppressing expression but at combating potentially harmful secondary effects. Given the extensive evidence supporting the City's secondary effects rationale, the state court rightly concluded that it was bound to review the ordinance as a content-neutral law subject to intermediate scrutiny.

b. For their part, even petitioners do not seem to doubt that at least some regulations of sexually explicit entertainment are content neutral and subject to intermediate, rather than strict, scrutiny. Petitioners submit, however, that "[t]he Court has not yet clarified when a government that has failed to meet its burden of proof with respect to secondary effects necessarily must satisfy strict scrutiny . . . ." Pet. 13. Petitioners describe two "conflicts" this purported "lack of guidance" has supposedly "spawned." *Id.* at 15. In fact, petitioners have identified no conflict, but, even if they had, resolution of that conflict would not change the outcome

of this case. Accordingly, there is no issue suitable for this Court's review.

i. First, petitioners claim there is a divergence in judicial opinion about whether, to be entitled to intermediate scrutiny, a defendant must first present evidence that the regulation of sexually explicit entertainment was aimed at combating potentially harmful secondary effects—or whether intermediate scrutiny is "presumptive[ly]" applicable to such regulations. Pet. 15-16. This "conflict" does not exist. None of the three cases petitioners cite "simply assume[d]," *id.* at 15, that intermediate scrutiny was applicable to a regulation of sexually explicit entertainment. In *Illusions-Dallas*, the court applied intermediate scrutiny because there was evidence that the law had been passed to combat negative secondary effects. See 482 F.3d at 308. In *Ben's Bar*, the challenged ordinance was accompanied by lengthy legislative findings describing the lawmakers' secondary effects rationale. See 316 F.3d at 705. And in *Café 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), the court held that intermediate scrutiny was warranted because of evidence that the lawmakers had considered studies conducted by other localities prior to enacting an anti-nudity ordinance. See 856 F. Supp. at 645. Equally significant, the Illinois Supreme Court did not "presumptively" apply intermediate scrutiny in this case. To the contrary, as we have explained, the court applied intermediate scrutiny because the City had presented copious evidence concerning the relationship between alcohol, sexually explicit entertainment, and crime. Pet. App. 31-40. If there exists a case in which a court applied intermediate scrutiny absent any evidence of a secondary effects rationale, that case is an unidentified outlier, and, moreover, it is not this case.

ii. Petitioners' second purported "conflict" concerns the requirement, articulated by some courts, that a legislature must support its secondary effects rationale with "pre-enact-

ment evidence." Pet. 17. See also *id.* at 14. This "conflict," if it even exists, is irrelevant to the outcome of this case because the City's support for its secondary effects rationale included evidence from the time of enactment. At the outset, however, petitioners' view that the City was required to present "contemporaneous legislative findings . . . to support the . . . claim that [the ordinance] was intended to combat secondary effects," Pet. 14, is incorrect. The Court long ago established the Constitution does not require "legislative findings," when, as here, the "statute's purpose of protecting societal order and morality is clear from its text and history." *Barnes*, 501 U.S. at 567-68 (plurality opinion). In this case, moreover, the alcohol ban could hardly contain "legislative findings" articulating the Chicago City Council's secondary effects rationale. It was enacted before *Renton*, which first established that municipalities may regulate adult entertainment establishments in an effort to combat potentially harmful secondary effects, and before *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), which first held that the Twenty-First Amendment did not alone allow regulation of First Amendment activity. Only after *Renton* and *44 Liquormart* could lawmakers have known that, when regulating sexually explicit dancing at liquor-licensed establishments, they should include a legislative history explaining their secondary effects rationale.

That does not mean the City Council was unaware of the problems associated with sexually oriented businesses selling alcohol. As we have explained, Officer O'Brien testified that the City saw a decline in prostitution after shutting down a number of establishments that offered liquor and nude dancing. And Assistant Commissioner Smith testified that he made recommendations to the City Council regarding further legislation based on his opinion that there is a relationship between sexually oriented businesses and an increase in crime. Although petitioners object, Pet. 14, the Illinois Supreme Court rightly relied as well on the preamble to the

later-enacted 1993 adult use ordinances as a statement of legislative purpose. The alcohol ban was part of a "legislative package" adopted to address concerns about the secondary effects of adult entertainment establishments. Pet. App. 34. See also *id.* at 32, 36. All told, the record amply demonstrates the City Council's contemporaneous purpose of combating secondary effects.[9]

In any event, petitioners' claim of a conflict with regard to pre-enactment evidence is largely overstated. Although petitioners correctly note that some courts have required pre-enactment evidence of a secondary effects rationale while other courts have not, the cases where pre-enactment evidence was required reviewed laws adopted after *Renton* and *44 Liquormart*. See *White River Amusement Pub. Inc. v. Town of Hartford*, 481 F.3d 163, 165 (2d Cir. 2007) (2002 public indecency ordinance); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251, 1253 (11th Cir. 2003) (1998 zoning ordinance). As we have explained, before that time, lawmakers could not have known to include a statement articulating their secondary effects rationale. Petitioners do not claim a conflict on older laws, much less where the reviewing court discerned legislative intent to regulate because of secondary effects.

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[9] Petitioners nevertheless claim that the legislative history shows that the alcohol ban was content-based. Pet. 14. As the Illinois Supreme Court explained, the cited language is not part of the ordinance itself; it is a generic description of the legislation included by the committee in its recommendation to the City Council that the ordinance be approved. Pet. App. 36. Moreover, "even if the committee's views could be imputed to the city council and even if the language it employed could be read as actually referring to the content of conduct that is protected, reference to content is not the same as suppression of content." *Ibid.* (citing *Sammy's*, 140 F.3d at 998). In any event, if the Illinois Supreme Court misconceived the legislative history, this issue does not warrant the Court's review, assuming it is even within the Court's jurisdiction.

2. Petitioners do not even attempt to identify a conflict with respect to the second question in the petition. Instead, petitioners merely disagree with the Illinois Supreme Court's determination that the alcohol ban satisfies intermediate scrutiny. Although the absence of a conflict alone is enough to deny review of this question, the Illinois Supreme Court's resolution of this issue is wholly correct.

a. After concluding that intermediate scrutiny should apply, the Illinois Supreme Court evaluated the strength of the City's evidence justifying its secondary effects rationale, including whether evidence offered by Pooh Bah "cast doubt," Pet. App. 40, on that rationale. This approach—as well as the court's determination that intermediate scrutiny was satisfied—fully complied with settled law.

In particular, this Court has "consistently held" that, when regulating erotic entertainment, "a city must have latitude to experiment, at least at the outset, and that very little evidence is required [to support an ordinance]." *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in the judgment). Accordingly, a municipality need only set forth evidence it "'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest," such as the control of potentially adverse secondary effects. *Id.* at 438 (plurality opinion) (quoting *Renton*, 475 U.S. at 51-52). Accord, *e.g.*, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1168 (9th Cir. 2003) ("The record here is hardly overwhelming, but it does not have to be."); *DiMa v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir. 1999) (municipality's "burden of showing that there is evidence that supports its proffered justification . . . is not overwhelming"). This includes, but is not limited to, the experiences of, and studies produced by, other cities, as well as findings in judicial opinions. See *Pap's*, 529 U.S. at 297 (plurality opinion); *Renton*, 475 U.S. at 50-51. The evidence merely "must fairly support the municipality's

rationale for its ordinance." *Alameda Books*, 535 U.S. at 438 (plurality opinion).

Indeed, a city's burden is particularly light where, as here, it seeks to regulate the sale of alcohol at sexually oriented businesses. This is because, as the Illinois Supreme Court recognized, "'[t]hat liquor and sex are an explosive combination' . . . is a proposition so frequently confirmed by human experience that it can scarcely be questioned." Pet. App. 37 (quoting *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001)). Accord, *e.g.*, *Bellanca*, 452 U.S. at 718 ("Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior."); *LaRue*, 409 U.S. at 118 (finding the "conclusion that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one"); *181 South*, 454 F.3d at 234 (describing "the 'unacceptable social behavior' that so often arises in conjunction with the combination of erotic entertainment and alcohol"); *Ben's Bar*, 316 F.3d at 708 (noting "the explosive combination of nude dancing and alcohol consumption"); *Department of Alcoholic Beverage Control*, 121 Cal. Rptr. 2d at 736-37 (it is "still broadly recognized today" that liquor and sex are an undesirable combination).

Under this minimal standard, the City's evidence—consisting of testimony about the experiences of other jurisdictions as well as Chicago itself—was more than adequate. Numerous courts have found similar evidence sufficient to justify ordinances regulating the combination of sexually explicit entertainment and alcohol. See, *e.g.*, *181 South*, 454 F.3d at 230 (state agency relied on "the long-standing judicial recognition that lewdness or immoral activity in conjunction with alcoholic beverage consumption can give rise to unacceptable social behavior") (internal brackets and quotations omitted); *Ben's Bar*, 316 F.3d at 725 (village relied on

studies done by and experiences of other municipalities and judicial opinions); *Sammy's*, 140 F.3d at 997 (city relied on studies done by and experiences of other municipalities, judicial opinions, and "wisdom and common sense"); *McCrothers*, 728 N.W.2d at 131 (city relied on studies done by and experiences of other municipalities and judicial opinions); *Purple Orchid*, 813 A.2d at 811 (board relied on experiences of foreign jurisdictions); *Goldrush II*, 482 S.E.2d at 367 (city relied on "the experiences of other cities that the council members reasonably believed to be relevant to the problems faced by Marietta"); *Urmanski*, 613 N.W.2d at 910 (town relied on information provided by the League of Municipalities and judicial opinions). There is no question under this unvarying standard that the City set forth evidence sufficient to justify its secondary effects rationale.

Moreover, the Illinois Supreme Court correctly concluded that Pooh Bah failed to call that rationale into question. In particular, Pooh Bah presented no evidence challenging the veracity of the historical account presented by Assistant Commissioner Smith and Officer O'Brien. Instead, Pooh Bah merely criticized the opinions proffered by the City's experts. As the Illinois Supreme Court recognized, however, these complaints did not undermine the City's rationale for its ordinance. Devise actually admitted on cross-examination that a correlation had been shown to exist between sexually oriented businesses that serve alcohol and an increased incidence of crime, while Professor Girandola confirmed that alcohol consumption is related to a higher level of aggression. Pet. App. 41. As for Campbell, he conceded that he had no opinion about the relationship between land use and crime and had conducted no research regarding the relationship between either alcohol or sexually oriented businesses and crime. *Ibid.*

At worst, Pooh Bah's experts disagreed with the City's experts about whether the City's concerns will be addressed

by the enforcement of the ordinance. But a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young*, 427 U.S. at 71 (plurality opinion). Indeed, "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in the judgment). See also *id.* at 440 (plurality opinion) ("we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems"). Thus, "mere differences of opinion" are not grounds for invalidating an ordinance. *McCrothers*, 728 N.W.2d at 138; accord, *e.g.*, *G.M.*, 350 F.3d at 639, much less for this Court's review of this fact-specific issue.

b. Although petitioners identify no conflict on this issue, they nevertheless argue that this case justifies review because it presents a "situation" that "[n]one of this Court's prior cases directly address [sic]." Pet. 20, that is, "whether a City regulation of expression may be upheld when a trial court finds that there is *no* evidence of harmful secondary effects emanating from the regulated expressive activity . . . ." *id.* at 19 (emphasis in original). Petitioners' view that the City was required to present evidence of adverse secondary effects associated with Pooh Bah's club itself to enact the alcohol ban or enforce the ordinance against it is incorrect.[10]

i. As this Court's cases make clear, an ordinance can be properly directed at the adverse secondary effects of sexually explicit entertainment based solely on evidence that those

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[10] In any event, contrary to petitioners' suggestion, the record is not bare on this point. The testimony of Pooh Bah's own witnesses reveals the pernicious secondary effects of the club itself. On one occasion, the police had to be called because a customer "expose[d] his erect penis and was stroking it in full view of other patrons and the entertainers." Pet. App. 8 n.7. The police were also summoned to deal with assaults both inside and outside of the club. *Id.* at 43.

secondary effects have been experienced in other cities. A "city need not conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Pap's*, 529 U.S. at 296 (plurality opinion) (citation and internal quotations omitted). Accord *Renton*, 475 U.S. at 50-52 (accepting City of Renton's reliance on the experience of Seattle as expressed in findings summarized in a prior decision). Accordingly, the state and federal courts have consistently held that a local government is not required to demonstrate adverse effects in its particular locality but may constitutionally rely on relevant studies from other areas. For example, in *Ben's Bar*, the court noted that the view that a local government "may not rely on prior judicial decisions or the experiences of other municipalities, but instead must conduct its own studies, at the local level . . . has been expressly (and repeatedly) rejected by the Supreme Court." 316 F.3d at 725. Accord, *e.g.*, *Bronco's Entertainment, Inc. v. Charter Township of Van Buren*, 421 F.3d 440, 451 (6th Cir. 2005); *Heidman v. South Salt Lake City*, 348 F.3d 1182, 1198 (10th Cir. 2003); *Jake's, Ltd. v. City of Coates*, 284 F.3d 884, 888 (8th Cir. 2002); *Artistic Entertainment*, 223 F.3d at 1309; *McCrothers*, 728 N.W.2d at 129; *Purple Orchid*, 813 A.2d at 811; *Restaurant Ventures v. Lexington-Fayette Urban County Government*, 60 S.W.3d 572, 578 (Ky. Ct. App. 2001); *El Marocco*, 746 A.2d at 1237-38; *Department of Alcoholic Beverage Control*, 121 Cal. Rptr. 2d at 736 n.10; *American Show Bar*, 30 S.W.3d at 334.

Petitioners' cases do not suggest otherwise. Instead, they address different issues. The problem in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), was that "the county's own studies negated the very interests it purportedly sought to prevent." *Id.* at 986. Thus, while that court agreed that "a governmental entity is not required to

perform empirical studies," it ruled that, "having done so, the [government] cannot ignore the results." *Ibid.* In *Illusions-Dallas*, the state supported its secondary effects rationale by referencing various foreign studies, but the district court excluded the studies, and the state did not challenge the exclusion on appeal. See 482 F.3d at 313. As the case came to the Eleventh Circuit then, there was no evidence of secondary effects, and the court struck down the challenged law. See *ibid.* But the court nevertheless noted that "the outcome could potentially have been different" had there been studies in the record. *Id.* at 315 n.11. And in *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), the court ruled that studies of businesses providing on-site entertainment could not justify an ordinance restricting the location of sexually oriented businesses selling videos and books, which are less likely than on-site businesses to produce harmful secondary effects. See *id.* at 294-95. Because this case presents none of these issues, it cannot conceivably conflict with petitioners' cases.[11]

ii. Petitioners attempt to avoid the settled rule that a municipality is not required to conduct its own studies by suggesting that there should have been evidence that "the

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[11] Petitioners also claim there exist "marked inconsistencies" in the Seventh Circuit's approach to the regulation of sexually explicit entertainment. Pet. 25. This claim can be ignored for purposes of granting review, but it is wrong in any event. The results in *Ben's Bar* and *R.V.S., LLC v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004), reflect differences in the ordinances at issue. *Ben's Bar* upheld an ordinance that, like the alcohol ban, prohibited nude and seminude dancing on liquor-licensed premises, see 316 F.3d at 707-08, while the ordinance in *R.V.S.* prohibited even clothed dancers from engaging in certain erotic movements, see 361 F.3d at 404-05. In striking down Rockford's ordinance, *R.V.S.* held that the city had failed to identify evidence "directly relevant to the type of entertainment that [it] seeks to regulate." *Id.* at 411. Notably, however, the court reaffirmed the holding in *Ben's Bar* that the ordinance challenged there was valid. See *id.* at 413.

additional covering of the buttocks (or sides of breasts) required by the Chicago Ordinance would have . . . [an] effect on secondary effects." Pet. 20. The Court expressly rejected this type of argument in *Alameda Books*, which addressed an ordinance prohibiting multiple entertainment businesses from operating in the same building. In enacting the ordinance, Los Angeles primarily relied on a planning department study, which indicated that crime had grown at a much higher rate in Hollywood, which had the largest concentration of sexually oriented establishments in the city, than in the city as a whole. See 535 U.S. at 435. The Ninth Circuit found that the study did not reasonably support the inference that a concentration of operations in the same building produced higher crime rates. See *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 724-25 (9th Cir. 2000). The Court reversed, explaining that the court of appeals had erred in requiring the city to prove that its theory about a concentration of operations is a "necessary consequence." 535 U.S. at 437 (plurality opinion) (emphasis deleted). To the contrary, under *Renton*, the city need rely only "on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438. See also *id.* at 449-52 (Kennedy, J., concurring in the judgment) (study relied on by city satisfies the "reasonably believed to be relevant" standard).

Following this approach, the lower federal courts have universally dismissed arguments like petitioners'. For example, in *Ben's Bar*, the Seventh Circuit ruled that the village did not need to present evidence "relating specifically to the effects of serving alcohol in establishments offering nude and semi-nude dancing," 316 F.3d at 725, or demonstrating that "the incidental restrictions placed on Ben's [Bar], over and above the pasties and G-string requirement, ameliorate any purported negative secondary effects," *id.* at 726. The court explained that, under established precedents and common sense, the village's secondary effects justification "was en-

tirely reasonable." *Id.* at 726. Accord, *e.g.*, *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2005); *Baby Dolls Topless Saloons v. City of Dallas*, 295 F.3d 471, 481-82 (5th Cir. 2002); *Purple Orchid*, 813 A.2d at 811. Indeed, in *BZAPS*, the Eighth Circuit rejected an argument similar to petitioners' on the ground that no precedent requires a municipality to obtain research targeting the exact activity it wishes to regulate. See 268 F.3d at 606-07. As the court explained, "We are satisfied that neither the first amendment nor Supreme Court precedent require the City to do the impossible." *Id.* at 607.

iii. Petitioners also rely on their view that the City's justifications for its ordinance "unraveled" during the litigation. Pet. 20. See also *id.* at 21 (describing the so-called "evidentiary failures and shifting rationales"). Contrary to petitioners' suggestion, *id.* at 20-21, the City never sought to prove a correlation between strip clubs that serve alcohol and decreased property values. The City's position throughout the trial was that the combination is correlated with crime. Tr. 3050-51. It is not unusual for a plaintiff, by the time of trial, to narrow the claims contained in its original pleading, so the allegation regarding property values in the City's complaint is beside the point. The same is true of the City's determination to focus its appeal not on the trial court's finding that the City had not sustained its burden of proof with regard to the prostitution charge, but on that court's conclusion that the alcohol ban was unconstitutional. Like a decline in property values, it was not necessary for the City to prove prostitution. Thus, these trial decisions, in addition to being fact-bound, do not call into question the Illinois Supreme Court's determination that Chicago's ordinance complies with the First Amendment.

c. This same obsession with the vagaries of this particular case dooms petitioners' argument that upholding the alcohol ban on this record raises both "a serious due process

question under the Fourteenth Amendment," Pet. 23, and "an important procedural question of First Amendment litigation," *id.* at 21. These questions have no significance outside this case. In addition, petitioners failed to forward a due process argument in their appeal to the Illinois Supreme Court, and, accordingly, any such argument is inappropriate for review by this Court. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). There is no reason to depart from that rule here.

As for petitioners' claim of an important First Amendment issue, it centers on an agreed order entered by the trial court to provide for immediate appeal of that court's ruling that the alcohol ban is unconstitutional. Petitioners believe they were entitled to a remand by virtue of the agreed order. Pet. 5, 21-22. The state court's reading of this order is no basis for this Court's review. In any event, as the Illinois Supreme Court recognized, petitioners' "sole reason" for requesting a remand is to "to renew and bolster [their] contention that the ordinance violates constitutional standards." Pet. App. 63. But petitioners had a full and fair opportunity to litigate this issue. At trial, Pooh Bah both cross-examined the City's witnesses and presented its own witnesses, including experts, who gave testimony directed at establishing that the ordinance was not justified by reference to adverse secondary effects. Petitioners have never identified what relevant evidence they think they have to present on remand, although we questioned this in the Illinois Supreme Court. It is not surprising that the court did not order a remand for evidence never identified. As far as appears, petitioners seek to present further evidence questioning the City's reliance on the secondary effects rationale. This effort was doomed from the outset because the City's burden was merely to identify evidence that it "reasonably believed to be relevant," not to prove the wisdom of its regulation to the trial court. There is surely no reason for a remand to continue this failed theory.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 13, 2007

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1614

IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

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INTRODUCTION

The City of Chicago's Opposition ("Opp.") well illustrates the doctrinal confusion that has divided the lower courts in seeking to determine whether a regulation of sexually oriented entertainment is content neutral, and, if so, how to apply the evidentiary burdens necessary to justify the regulation. Like the Illinois Supreme Court below, the City simply assumes that intermediate scrutiny is the correct standard of review *because* the ordinance at issue regulates sexually oriented entertainment without regard to content neutrality. The City also erroneously contends that it has fulfilled its "light" evidentiary burden notwithstanding the trial court's finding that "the record [is] devoid of any proof of the existence of or even the possibility of potentially harmful secondary effects" (App. 147), and despite the fact that Petitioners were not permitted to complete their case. The Opposition blithely overlooks a growing split among the circuit courts on each of these issues, and thus highlights why review by this Court is warranted.

I. STRICT VERSUS INTERMEDIATE SCRUTINY

1. The City does not question the settled law that strict scrutiny must be applied when regulation of expressive conduct is content-based unless the government can establish a neutral purpose. Petition for Certiorari ("Pet.") at 11-13. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). However, it argues that the court below properly applied intermediate scrutiny after it found that the "only motivation" for Chicago Municipal Code § 4-60-140(d) ("Coverage Ordinance") was as a content neutral regulation of "negative secondary effects." Opp. at 13-14. What is missing from the City's analysis is any evidence of legislative purpose for the ordinance at issue in this case. However, "a city must advance some basis to show that its

regulation has the purpose and effect of suppressing secondary effects." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring).[1]

a. The City, like the court below, relies exclusively on testimony about prostitution on Chicago's Rush Street in years past and to legislative findings for a 1993 zoning ordinance, with which Pooh Bah has always complied, that was adopted *fifteen years after the Coverage Ordinance*. Opp. at 3-6, 13-14; App. 31-36. Neither that testimony nor the purported "findings" speak to the motivations for enactment of the 1978 Coverage Ordinance. As Justice Freeman explained, the court below made a "clear and plain error" in "incorrectly citing the legislative history and preambles of the City's 1993 adult use zoning ordinance as if that were the legislative history and original city council intent." App. 79 (Freeman, J., dissenting from denial of reh'g). The Opposition merely repeats that error.

b. The City's reliance on "findings" made fifteen years later to justify the 1978 Coverage Ordinance confirms that this case implicates the deep split of authority on whether post-enactment evidence can be used to show a content neutral purpose. *See* Pet. at 17 (citing cases). The City expressly acknowledges the circuit split. Opp. at 17. It says only that "lawmakers could not have known to include a statement articulating their secondary effects rationale" because the Coverage Ordinance was enacted before *Renton*. *Id. See also id.* at 16. Not only is this a frank admission that the City has zero evidence of a content neutral purpose for the Coverage Ordinance, it is no answer to the doctrinal question raised by the instant Petition. The City's excuse for why it lacks evidence of legislative intent is irrelevant. It is settled that the showing of a content neutral purpose, required by *Renton* and

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[1] For purposes of this analysis, Justice Kennedy's opinion may be considered the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977); *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976).

its progeny, applies fully to this case even if that requirement was articulated in later cases. *See, e.g., Marks*, 430 U.S. at 196-197; *Hamling v. United States*, 418 U.S. 87, 102 (1974).

c. The *only* contemporaneous legislative statement of purpose for the 1978 Coverage Ordinance indicates that it was intended to regulate content, *i.e.*, to "control[ ] the form of entertainment" in venues that serve alcohol. (App. 157.) The City disputes that this statement demonstrates a content-based purpose, yet admits as much by characterizing it as "a generic description of the legislation included by the committee in its recommendation to the City Council." Opp. at 17 n.9. Even if the City's conclusion is accepted, this leaves no record support for the City's claim of content neutrality. [2]

d. The City subsequently sought to fill this vacuum by proffering various post-enactment theories of legislative purpose. However, the City abandoned various content neutral justifications in the course of litigation. Pet. at 20-21. Significantly, the City relied heavily on a content-related justification for the Ordinance—that the effect on the patron of combining alcohol and erotic dancing causes crime. App. 32, 38. The Court below agreed with the City and relied on content-based justifications for the law—*i.e.*, not secondary effects, but rather direct effects on patrons of adult entertainment. App. 37-40, 43. *See also* App. 68 (Freeman, J., dissenting from denial of reh'g) (the Court justified ordinance based on "supposed effects of the regulated conduct on its audience"). If this indeed was the City's purpose, it should have been subject to strict scrutiny. Pet. at 15-16.

2. The City's argument that the ordinance regulates alcohol sales—and not expression—is a red herring. Opp. at 8-14. Even where government claims to target the putative

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[2] The City also admits that the Illinois Supreme Court may have "misconceived the legislative history," but fails to grasp that this error leaves it without any content neutral justification whatsoever for the Coverage Ordinance. *See* Opp. at 17 n.9.

secondary effects of adult entertainment, there can be no pretense it is not regulating speech but only liquor licensing. *See Pap's A.M.*, 529 U.S. at 294-95 (allowing "States ... to regulate secondary effects" necessarily involves "intrusions on expression") (discussing, *inter alia*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). Since *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), and certainly since *Pap's A.M.*, there can be no serious claim that regulating exotic dancing in liquor-serving venues "do[es] not restrict expression," as the City argues here. Opp. at 10 n.6. In *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 306-07 (5th Cir. 2007) the Fifth Circuit cataloged the Third, Fourth, Sixth, Seventh, and Eleventh Circuit cases that concluded that *44 Liquormart* "requires that alcohol regulations of [sexually oriented businesses] be analyzed in light of the First Amendment." Precedent from six Circuits shows that it is hardly just "two cases . . . in which a restriction on sexually explicit dancing at liquor-licensed establishments" was analyzed under the First Amendment, as the City claims. [3]

Using license revocation as the means of punishment does not change the fact that the activity being punished is speech. Here, the City maintains that Pooh Bah may keep its liquor license and avoid punishment if it alters the type of speech it provides. But a "state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising

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[3] *See* Opp. at 13. *44 Liquormart* sounded the death knell for the argument that the Twenty-First Amendment provides a separate basis for regulating speech. 517 U.S. at 516. It also is clear that the *Alameda Books* analysis applies to adult entertainment regulation imposed through alcohol license limitations. *See Illusions-Dallas*, 482 F.3d at 306-07. The City's reliance on pre-*44 Liquormart* cases is unavailing, Opp. at 9, 10-11 & n.7, as is its citation of *181 South Inc. v. Fischer*, 454 F.3d 228, 233 (3d Cir. 2006) (Third Circuit expressly declined to base its holding on the argument that a regulation is constitutional where a state prohibits alcohol sales in "inappropriate locations").

one's constitutional rights, especially one's right to free expression." *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994) (citing, *inter alia*, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). *See 44 Liquormart*, 517 U.S. at 513 ("Even though government is under no obligation to provide . . . a particular benefit," such as "cho[osing] to license . . . liquor" purveyors, "it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.").

3. The City's claim that no circuit conflict exists regarding the nature of the government's burden to show a content neutral purpose is plainly wrong. Opp. at 15. It ignores the cases cited in the Petition which held that courts cannot "simply assume that the legislature's purpose was to combat the negative impact on health, safety, and welfare," *e.g.*, *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1282-83 (11th Cir. 2001); *R.V.S., LLC v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004); *see also G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 638 (7th Cir. 2003); *Schultz v. City of Cumberland*, 228 F.3d 831, 844 (7th Cir. 2000), as distinguished from cases presuming content neutrality "even without a legislative record to suggest a purpose unrelated to speech." *E.g.*, *Illusions-Dallas*, 482 F.3d at 309 (5th Cir. 2007); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 712 (7th Cir. 2003); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1195 (10th Cir. 2003); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 292 (5th Cir. 2003); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 947 (11th Cir. 1982); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 514 (4th Cir. 2002). The cases show a significant amount of confusion on this key threshold question not only between different circuits, but among different panels of the same circuit. Accordingly, clarification by this Court is urgently needed.

II. THE CITY'S EVIDENTIARY BURDEN

1. The City entirely misses the point of the second issue presented in the Petition. The petitioners seek clarification by this Court of the government's burden of proof where the litigants have cast doubt on the city's evidence and theories, and where the trial court has found that the record lacks any proof of potentially harmful secondary effects. (App. 147). The City argues that it need only show that it "reasonably believed" the Coverage Ordinance would help combat secondary effects, and that petitioners "do not even attempt to identify a conflict with respect to the second question [presented in the Petition]." Opp. at 18-26. This assertion ignores a significant split among the circuit courts as to the appropriate evidentiary burden and advocates the absurd position that local governments need offer no tangible evidence other than their beliefs about possible secondary effects.

a. In *Alameda Books*, this Court explained that, in order to show a regulation furthers a substantial government interest under intermediate scrutiny, the government must show a connection between the speech regulated and undesirable secondary effects. *Alameda Books*, 535 U.S. at 434-38. Although the City correctly notes that it may seek to satisfy this burden by relying on any evidence that is "reasonably believed to be relevant" to this inquiry, *id.* at 438, it utterly ignored the rest of the Court's holding: "If plaintiffs succeed in casting doubt on a municipality's rationale . . . the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439. *See also id.* at 453 (Kennedy, J., concurring) ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny."). In such a case, it simply will not do for the government to assert, contrary to the evidence, that it nevertheless was persuaded by its own asserted secondary effects rationale and that it has no burden to support its conclusion beyond its own "reasonable belief." The City's suggestion

that once doubt is cast on the government's rationale, its burden to respond is *de minimis* would render meaningless this Court's insistence that governments not rely on "shoddy data" to avoid strict scrutiny when regulating adult entertainment.

b. That is precisely what happened in this case. After hearing all the evidence and assessing the credibility of the City's witnesses, the trial court found the City had failed to show "even the possibility of potentially harmful secondary effects." (App. 147.) Although Pooh Bah was able to present some evidence, if it had been allowed to complete its case after the Illinois Supreme Court's reversal of the trial court ruling, it would have been able to introduce expert testimony as well as published studies on the absence of secondary effects in these kinds of venues, thus further demonstrating the shoddy nature of the City's data.[4] The Illinois Supreme Court's failure to remand for further evidence contravenes *Alameda Books*, where this Court remanded for further proceedings. 535 U.S. at 432-33, 343. *See also* Section III, *infra.*

2. Although *Alameda Books* requires a process by which petitioners may challenge the government's asserted rationale and shift the evidentiary burden back to the municipality, the lower courts have been greatly divided in ascertaining and applying these burdens. *E.g., Top Flight, Inc. v. City of Inkster*, No. 06-12399, 2007 WL 643897, at *9 (E.D. Mich. Feb. 26, 2007) ("Stating the precise parameters of a munic-

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[4] *See, e.g.*, Daniel Linz, Mike Yao, and Sahara Byrne, *Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments That Sell Liquor?*, 7 COMM. L. REV. 23, 44 (2007) ("Results from previous studies and the results from the present study suggest either no relationship or even a negative relationship between the presence of alcohol serving adult entertainment establishments and adverse secondary effects in the form of sex related crime activity."); Bryant Paul, Daniel Linz, and Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. LAW & POLICY 355 (Spring 2001).

ipality's burden to support its asserted secondary effects is difficult . . . due to the splintered nature of the leading Supreme Court opinions in this area of law."). Some courts require the government's rationale to be rebutted by clear and convincing evidence, although this Court has never spoken to that question. *Compare Giovani Carandola*, 303 F.3d at 516; *Steiner v. County Comm'rs of Caroline County*, 490 F.Supp.2d 617, 625 (D. Md. 2007), *with, e.g.*, *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1271-72 (11th Cir. 2003) (substantial and unanswered factual challenges are sufficient to cast doubt on government rationale). Others have reached sharply divergent conclusions about the government's evidentiary burden. *Compare Rockford*, 361 F.3d at 411-13 (government failed to cite sufficient evidence of connection between adult entertainment and secondary effects); *Encore Videos*, 330 F.3d at 294-95 (same); *Flanigan's Enters., Inc. v. Fulton County*, 242 F.3d 976, 985 (11th Cir. 2001) (court may not "presume the evidence needed" to show secondary effects); *Illusions-Dallas*, 482 F.3d at 313 (striking down ordinance on "record [ ] completely devoid of any evidence that a secondary effects problem exists"), *with Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 560-61 (5th Cir. 2006) (even where plaintiffs' expert's report showed that "no arrests at strip clubs had occurred for prostitution, drugs, or assault," plaintiffs failed to cast doubt on government's secondary effects rationale).

This is not, as the City attempts to frame it, a situation in which some local governments have provided sufficient evidence to support their regulations while others have not. Opp. at 22-23. Rather, the different outcomes have resulted from the lack of clear guidance from this Court as to the respective burdens of proof. Even in the brief time since the Petition was filed, further dissension among the Circuits emerged. *Compare Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 874-85 (11th Cir. 2007) (finding City carried its burden to show secondary effects despite

significant expert testimony to the contrary), *with Abilene Retail #30, Inc. v. Bd. of Comm'rs*, __ F.3d __, No. 05-3473, 2007 WL 1982130, at *9 (10th Cir. July 10, 2007) (in attempting to meet initial burden, government may not "rely on the existing body of prepackaged secondary effects studies" but instead must "show[ ] that the evidence . . . relied [on] is germane to their local experience"); *id.* at *13-17 (Ebel, J., concurring) (disagreeing with majority that government met its initial burden but stating that plaintiff cast sufficient doubt on government's secondary effects rationale). This continuing confusion cries out for review by this Court.

III. LACK OF DUE PROCESS

The City declined to address the merits of the due process question presented in the Petition based on its erroneous claim that the issue had been waived and its mistaken view that it is not a distinct issue. It is wrong on both counts.

1. The claim that Pooh Bah waived the due process issue is absurd. It was the Illinois Supreme Court's refusal to allow further evidence of the First Amendment issues on remand that created the due process problem. *See* Pet. at 22. Pooh Bah thus could not have "failed to forward a due process argument in their [sic] appeal to the Illinois Supreme Court," Opp. at 26, because the due process violation had not yet occurred. Pooh Bah briefed the due process violation on rehearing before the state high court. *See* App. 65 (Freeman, J., dissenting from denial of reh'g) ("in [the] rehearing petition . . . this court's opinion . . . violates the 'constitutional required procedures for intermediate scrutiny * * * resulting in a denial of due process'") (ellipses added, asterisks original). Petitioners also continue to press the issue before this Court. The issue has not been waived.

2. Contrary to the City's contention that due process "questions have no significance outside this case," Opp. at 26, this procedural question goes to the heart of *Alameda Books'* burden shifting process. *Alameda Books* makes clear that,

when a challenger raises questions about the asserted rationale by showing data and/or reasoning flaws, the City faces a "burden [that] shifts back to [it] to supplement the record with evidence renewing support . . . that justifies its ordinance." 535 U.S. at 439. *See id.* at 453 (Kennedy, J., concurring). Due process requires that affected businesses must have a chance to "cast doubt" on the government's rationale for regulating adult entertainment. *Id.* at 438-39. In this case, however, Pooh Bah was not afforded a "full and fair opportunity" to make this showing, Opp. at 26, because the trial court interrupted Pooh Bah's case—to conclude the trial by holding the City did not meet its initial burden—before Pooh Bah could finish presenting evidence. Pet. at 4, 22. This Court must clarify what evidentiary procedures are required in these circumstances.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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FILED
AUG. 24 2007

(3)

No. 06-1641

IN THE

Supreme Court of the United States

JUAN C. ESPINOSA, *et ux.*,

Petitioners,

v.

UNION COUNTY, NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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The Respondents did not address the simple and undisputed bases for the Petition for a Writ of Certiorari.

First, it was "undisputed" that Petitioner had a constitutionally protected "property interest in his job" as a jail guard at all times including when the Respondents ordered him to return to the jail. (App. 16a) (The Respondents' reliance on *Gilbert v. Homar*, 520 U.S. 924 (1997), provides no support for the lower Court's *sua sponte* conclusion that the Petitioner had a "weak" constitutional interest in his job.)

Second, it is undisputed that the Respondents admitted that the Petitioner "would be unable to return to work" in the jail and the lower Court took as true Petitioner's assertion that he "could not return to work." (App. 23a, 27a.) (The Petitioner was the first guard to break the Blue Wall of Silence. Also, the Petitioner was the only guard who tried to help the abused detainees, identified by the detainees as having tried to help them, praised as courageous in writing by the Prosecutor for his voluntary testimony, and permitted to leave the jail for safety reasons.)

Third, it was undisputed that Petitioner repeatedly pleaded for comparable alternative employment outside the jail and the Respondents never made any efforts to find alternative employment although they freely admitted that such positions were available.

Fourth, it is undisputed that the Petitioner now holds a nontenured position with a lower rank, earns less than half his prior salary, and will lose in excess of a million dollars through his retirement given his reduced salary, loss of benefits and pension, and overtime pay.

It is respectfully submitted that the termination of Petitioner's tenured employment for not returning to the jail was unlawful, and inherently discourages any law enforcement officer from voluntarily, and truthfully, testifying against a fellow officer in the future.

CONCLUSION

Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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MOTION FILED

JUN 5 2007

(3)

No. 06-1614

In the
Supreme Court of the United States

POOH BAH ENTERPRISES, INC., et al.,
Petitioners,

v.

THE CITY OF CHICAGO, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION AND THE FREE SPEECH COALITION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the First Amendment Lawyers Association and the Free Speech Coalition hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for petitioner was requested and obtained. The consent of the attorney for respondent was requested but was refused.

The interest the First Amendment Lawyers Association is derived from the fact that the organization is composed of attorneys whose practices substantially involve advocating for free expression matters including, in virtually every member's case, matters concerning sexually oriented expression, often in virtually identical scenarios as the one reflected in the instant case. The members are deeply concerned that both state and federal courts throughout the country need guidance and specificity to eliminate the manifest confusion and inconsistent application of this Court's "secondary effects" jurisprudence, which confusion and inconsistency is rampant throughout the federal district courts, circuit courts, and every level of state court dealing with issues involving challenges to legislative restrictions on "adult entertainment."

The interest of the Free Speech Coalition is similar, in that the Free Speech Coalition is the trade association of the adult entertainment industry and is composed of businesses and individuals each of which is involved in some aspect of that industry. Its members include businesses which present expressive entertainment of the same format as that restricted by the legislation at issue in the instant action. The Free

Speech Coalition is often faced with questions from members seeking guidance on issues similar to those presented.

This Petition has national implications for the evaluation of legislation dealing with an analysis of the "secondary effects" doctrine, an issue of far greater proportions than the isolated issues involved in the instant action, which issues go to the heart of the integrity of the judicial system and the fair and consistent application of the rules of evidence in cases involving adult entertainment issues.

For the above reasons, the First Amendment Lawyers Association and the Free Speech Coalition respectfully request that this Motion for Leave to File the Attached Brief, *amici curiae* be granted.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Although not strictly required by Rule 29.6 or 37.5, the instant *Amici* submit the following corporate disclosure statement:

Each of the *Amici* is a nonprofit corporation. None has any parent corporation, and none has issued any stock. For this reason, no parent or publicly held company owns 10 % or more of the stock of any of the *Amici* corporations.

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INTEREST OF *AMICI*

Amicus First Amendment Lawyers Association is composed of attorneys whose practices substantially involve free expression matters including, in virtually every member's case, matters concerning sexually oriented expression. The members are deeply concerned that both state and federal courts throughout the country need guidance and specificity to eliminate the manifest confusion and inconsistent application of this Court's "secondary effects" jurisprudence, which confusion and inconsistency is rampant throughout the federal district courts, circuit courts, and every level of state court dealing with issues involving challenges to legislative restrictions on "adult entertainment."

Amicus Free Speech Coalition is the trade association of the adult entertainment industry and is composed of businesses and individuals each of which is involved in some aspect of that industry. Among its members are retailers of sexually-oriented expression and clubs presenting erotic dancing. These members and others face the sort of differentially restrictive zoning regulations at issue here.

Counsel for the Petitioners are among the approximately 200 members of the *Amicus* First Amendment Lawyers Association.[1] None of the Petitioners is otherwise a member of the *amicus*.

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[1] No counsel for any party authored this brief in whole or in part, and no one other than the instant *Amici* and their counsel and members made any monetary contribution to the preparation or submission of this brief. *Cf.* Rule 37.6.

CONSENT OF THE PARTIES

The consent of the attorneys for petitioners was requested and obtained. The consent of the attorney for respondent was requested but refused. Thus, a motion requesting leave to file the instant brief precedes. Rule 37. 2(b)

ARGUMENT IN SUPPORT OF THE PETITION

This case presents an important and critical question regarding issues that have both confused and tortured courts at every level of state and federal judiciaries, both before and, troublingly, *after* this Court's divided decision in *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002). Even though many of the factual scenarios of these cases differ, the evidentiary analysis is the same whether alcohol is involved or not. This confusion has emanated from the first true articulation of the "burden shifting" evidentiary process to deal with challenges to "shoddy data and evidence" so often used by governmental bodies to support legislation that is seldom based on any actual concern for "secondary effects," but more often the product of objections to the "content" of the expression. This Court is being called upon to provide guidance and specificity as to what ***analytical framework*** and type of ***evidentiary burden*** must be utilized in evaluating challenges to adult entertainment legislation. Since this legislation directly impinges on the exercise of fundamental First Amendment rights and imposes regulatory and operational restrictions that, under the guise of being adopted to address the alleged "adverse secondary effects" purportedly caused by the adult businesses sought to be regulated, often results in the annihilation of those businesses, this petition seeks to eliminate the practice of countless courts in "picking and choosing" isolated language from the *Alameda Books* decision

to support totally inconsistent and irreconcilable approaches to the "burden shifting" analysis articulated therein.

This case is about one of the most precious aspects of the First Amendment: at what point can the government impose "censorship under the guise of legislation." This goes to the core fundamental right of citizens to choose what type of entertainment they wish to partake of without unjustified governmental interference or the total elimination of First Amendment freedoms. *Amici* urges the acceptance of the Petition for review and clarification because it satisfies each of the factors identified in Rule 10 that guide this Court's decisions as to whether or not to grant certiorari review. The decision of the Illinois Supreme Court, in addition to being a manifest denial of Petitioners' due process rights by failing to allow Petitioner to fully litigate its claims because of judicial rulings in Petitioners' favor that "cut off" Petitioners' presentation of additional evidence and testimony in its favor that were later reversed, is in direct and irreconcilable ***conflict with decisions of this Court***. The questions presented identify a critical ***conflict among the federal circuits***, and both state and federal courts across the Nation have cried out for clarification of the Byzantine framework that this Court's recent divided decisions on adult entertainment legislation have created, even if unintentionally.

Of equal importance, the Illinois Supreme Court has decided a ***significant question of federal law,*** arising under the Free Speech Clause of the First Amendment, that has been consistently interpreted in different ways by multiple state and federal courts, on critical issues that have not been clearly settled by this Court, but that cry out for resolution, a fact articulated by the state decision at issue herein, and repeated at every state and federal level, either explicitly, or by implication. This has been brought about by differing and

irreconcilable opinions arising from the various courts dealing with the issue.

It is of the utmost constitutional importance that this Court grants this Petition. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But in virtually every level of the judiciary today, and robustly evident throughout the Federal Circuits misconstruing or attempting to "fill in the blanks" of this Court's prior adult entertainment decisions, the right to Free Speech is in extreme peril. If censorship, achieved through the imposition of regulations that infringe on the lawful operation of such businesses, can occur with ***no clear burden*** on the government to prove any governmental interest served by that censorship, freedom is lost.

This case involves nothing less important than the First Amendment, and the decision sought to be reviewed in this Court, as set forth below, is worthy of consideration, if for no other reason than the confusion in this area of the law repeatedly complained of by virtually every court trying to fairly and consistently apply the Rule of Law to these critical First Amendment issues.

I. The Rejection of "The Rules Of Evidence" In Adult Entertainment Cases Is In Direct Conflict With This Court's Decision In *City of Los Angeles v. Alameda Books* And Further Aggravates The Existing Split Of Authority And Confusion Interpreting That Decision

The confusion over applying the *Alameda Books* case, and the apparently "optional" and sporadic allowance of any proper evidentiary analysis of the "burden shifting" procedure

articulated in that case, has been repeatedly complained about by many courts. For example, one court articulated the problem as follows:

> "[This]... presents an issue that has ***often been litigated in the courts of this nation***: when and to what extent may the government regulate an adult use...***[R]esolution of this issue is complicated by court's inability to articulate a clear set of principles to govern cases such as these.***"[2]

Through this action, Petitioner seeks to have this Court establish an unequivocally "***clear set of principles,***" and to establish an appropriate evidentiary framework for the courts, not only in Illinois, but in every other court in the Country that must deal with these issues. This Court should grant the petition and craft a workable framework where some modicums of the rules of evidence are applied to "secondary effects" challenges. Petitioner clearly seeks a way to ensure that all courts apply ***consistently*** and with ***precision*** a minimum of evidentiary fairness in this controversial, frequently litigated, but critical area of Free Speech. This is required by the barest modicums of both the equal protection doctrine and substantive due process. *Amici* also urge this Court to grant review to reconcile the monumental conflict between the Federal Circuit Courts in their application of *Alameda Books*, and its state and Federal progeny, and seek a the day when such evidentiary evaluations will be constitutionally consistent.

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[2] *XLP Corp. v. Lake County*, 832 N.E.2d 480, 359 Ill. App. 3d 239 (2nd Dist. 2005).

Unfortunately, despite this Court's best attempts, the state of the law is in chaos. More than one court has complained that guidance from the Supreme Court on this issue has been somewhat less than clear, and the courts have complained that they must begin their analysis by setting forth the law in the best fashion they can from applicable precedent, noting that doing so is very difficult. Many courts are virtually crying out, almost directly, for the necessity of this Court to enunciate a clear evidentiary standard, eliminating any question, and eliminating any "nebulous state of the case law" that would interfere with the consistent and properly guided evaluation of similar issues by the courts everywhere these issues frequently arise. If the number of cases where identical concerns are articulated does not inspire this Court to accept review of this matter, then countless courts will be inevitably destined to evaluate similar challenges regarding the critical issues presented by the instant action, and relegated to the same evidentiary chaos that has resulted from either an inability or a flat refusal to properly apply *Alameda Books*, all at a grave cost, not only to liberty, but to the preservation of the Rule of Law. It is respectfully requested that this Court grant this Petition.

II. This Court has Historically Shown a Desire to Protect the First Amendment, Even in Areas of Great Controversy, and Should Do So in this Action

From a historical perspective, this Court has consistently shown a desire to protect the First Amendment, even, and sometimes particularly, in areas of great controversy. As this Court has stated, there is a presumption that any governmental restraint on expressive conduct is impermissible. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239 (1975). The *Alameda Books* decision and the articulation of the "burden shifting"

procedures articulated therein, was not entirely unprecedented. Early on, ***simply applying the rules of evidence***, this Court held that, once a party demonstrates that a regulation deprives it of protected freedom of expression, the burden shifts to the governing body to justify that infringement. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, 104 S. Ct. 2118 (1975). To address the issue from its most basic starting point, any form of legislation restricting any businesses deemed to be "adult entertainment" must be analyzed under the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1697 (1995).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest, established by *evidence* showing the existence of problems that would be favorably addressed by the legislation, to prevent the so-called "adverse secondary effects" *shown to exist,* that were allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Renton, supra*. A requirement of this concept was that the existence of these adverse secondary effects be *established* through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982). *Alameda Books* was not the first case to identify this fundamental requirement. Under the clear mandates of the law articulated in *Alameda Books*, it is a fundamental concept of statutory construction to make sure that the restrictions imposed by legislation are actually supported by the evidence trying to establish the existence of an otherwise unremediated

governmental interest. See *Basiardanes v. City of Galveston,* 682 F2d 1203, 1213 (5th Cir. 1982). Every Ordinance requires the Court:

> "...To examine the strength and legitimacy of the governmental interest behind the ordinances and the precision with which the ordinance is drawn. Unless the ordinance ***advances*** significant governmental interests and ***accomplishes*** such advancement without undue restraint of speech, the ordinance is invalid." *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim,* 101 S.Ct. at 2183-2184. (Emphasis added).

Justice Souter's dissent in *Alameda Books*, while not agreed with by all justices, is really nothing more than an articulation of the rules of evidence in the evaluation of challenges to "secondary effects" accusations against adult oriented businesses. The variations about ***what can be considered as evidence***, and what level of scrutiny should be applied, is, unfortunately but truthfully, "all over the road." *Alameda Books*, more than anything else, articulated that there could be a minimal burden for acceptable "legislative evidence," but, once challenged, the government had to carry its burden with evidence of "equal dignity," competent and substantial, if not rising to the level of *Daubert*.[3]

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[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the benchmark case wherein this Court put strict limits on the admissibility of "junk science" into evidence. In all fairness, as Justice Souter articulated in his dissent in *Alameda Books*, if there is a "science" that lends itself to the evaluation of the veracity of a given issue, wouldn't the "search for the truth" be aided by its use?

Problems arise because, while virtually every court evaluating the ***Alameda Books*** case has found that Justice Kennedy's concurrence should be recognized as the decisive holding in that case,[4] there is a clear conflict in the way that the various courts dealing with these issues have attempted to apply the holdings in *Alameda Books* to their respective actions.

Even though there is agreement on who articulated the "holding" of *Alameda Books,* there is ***no agreement*** as to what type of evidence is relevant, or what that "burden" actually is, after it "shifts." Establishing that the rules of ***evidence*** apply in every judicial proceeding, it must be obvious to this Court the importance of emphasizing that the rules of evidence must be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that *the truth may be ascertained* and proceedings *justly administered.*" FRE 102, emphasis added. As will be shown in the following section that "search for the truth" can depend on what jurisdiction you are in, and this fact alone precludes ***any*** possibility that any such proceedings will be "justly administered."

Finally, most of the courts that are antagonistic to challenges to adult entertainment legislation appear to impose a tacit "higher" evidentiary burden on adult businesses when utilizing the "burden shifting" procedures set forth in

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[4] *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), *SOB v. County of Benton* 317 F.3d 856 (8th Cir. 2003), *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003).

Alameda Books. Such an approach is totally improper. Since all these cases deal with ***civil matters,*** the burden is "***preponderance of the evidence,***" a fact lost on many courts dealing with these issues. See *Bourjaly v. United States*, 483 U.S. 171, 175, 107 S.Ct. 2775 (1987). Acceptance of this action for review can end this inappropriate practice, a practice perhaps never before so acutely depicted as in the *Pooh Bah* decision at issue herein.

In *Pooh Bah,* the Illinois Supreme Court totally ignored the relevant evidence, the *best evidence* of whether or not the business in question actually caused any secondary effects, by eschewing with impunity the statistical and empirical (not a dirty word in the realm of evidence) data that was compiled showing the actual characteristics of the business at issue. Instead, in a situation that would be unconscionable in any other context, the Court focused on testimony from a city planner, commenting on outdated and historical problems from decades earlier in other city areas near the location of the subject business.

III. The Refusal Or Inability of the Courts To Consistently Apply The Rules Of Evidence In Applying The *Alameda Books* Decision Has Resulted In A Denial Of Justice Throughout the Nation

The debate over what "type" or "quality" of evidence will be considered in cases challenging adult entertainment regulations has been raging ever since the "secondary effects" doctrine was first enunciated in *Young*. The answer to this problem is as easy as saying that the rules of evidence apply to "secondary effects" challenges, just as they would in any other evidentiary setting. As identified by Justice Souter in *Alameda Books*, there is both a reliable and "just" method to "test the hypothesis" of whether or not "adult uses," or even

more fairly in the search for "the truth", specific ***types*** of adult uses, not a useful term when the only common denominator of "adult businesses" in most legislation is the presumed content of expression at issue, a denominator that is virtually useless when it is used to lump together multi-million dollar dance cabarets with shabby store front massage parlors, small adult bookstores, and premises that deal only with "off premises" consumption of expressive fare. Despite operational differences that would result in the automatic judicial compartmentalization of such different types of businesses for any kind of judicial analysis of *any* issue, uses like Pooh Bah are relegated to defending governmental accusations that, if they ever occur, do not occur at "upscale facilities" lie the business operated by *Pooh Bah*.[5]

One of the most accurate articulations of *Alameda Books* is set forth in *Giggles World Corp. v. Town of Wappinger*, 341 F. Supp. 2d 427 (SDNY 2004):

> "...The burden is upon Wappinger to ***produce evidence in support of its belief that businesses such as Giggles are likely to produce harmful secondary effects.*** *See City of Los Angeles v. Alameda Books, 535 U.S. 425, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002)* (stating that "this is not to [**9] say that a municipality can get away with shoddy data or reasoning. [HN12] ***The municipality's evidence must fairly support the municipality's rationale for the ordinance.***") While Defendants' ***motion for summary judgment may demonstrate that various studies show***

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[5] *Encore Videos, Inc. v. City of Antonio*, 330 F.3d 288 (5th Cir. 2003) and *Erotique Shop Inc. v. City of Grand Prairie*, 2006 U.S. Dist. Lexis 85992 (N.D. TX. 2006).

> ***the harmful secondary effects of adult use businesses in other municipalities, Defendants still must show some evidence that Giggles' business poses a risk of causing the same type of harm."***
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> *Id.* 341 F. Supp. 2d 427, 430-31 (SDNY 2004), emphasis added.

Unfortunately, there are scores of decisions that are based on an entirely different understanding of the required evidentiary burdens. These decisions that have essentially ignored the presentation of unassailable *evidence* "casting doubt" on the findings upon which various adult use restrictions have been based, include: *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2003); *Worldwide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004); *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003) *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp. 2d 672 (W.D. Kentucky 2002); *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *N.W. Enterprises v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington*, 2004 WL 1779014 (N.D. Texas 2004); and *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006). These cases represent just a sample of how various courts, attempting to apply *Alameda Books*, have completely misapplied any evaluation of evidentiary "challenges."

Emphasizing this enormous and irreconcilable conflict, there are ***scores of other decisions misconstruing Alameda Books***, and this is a problem of huge constitutional

significance, underscored by those decisions that actually show an understanding of *Alameda Books*, and allow the ***rules*** of evidence to be utilized in evaluating countervailing ***evidence*** and invalidating unsupported legislation, when justified by a proper evaluation of ***the truth***. Of the cases that "get it right," the clearest is *Peek-a-Boo Lounge of Bradenton, Inc.v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003), another case where the court complains that any assessment of evidence is difficult, "because of the large number of no-clear-majority decisions of the Court in cases of this type...." *Id.* at 1254.

The other decisions showing a split among virtually every level of the judiciary, and specifically among the federal circuit courts include: *Dima v. High Forest Township,* 2003 WL 21909571 (D.Minn. 2003)("... *Alameda Books* certainly clarifies the manner in which the Court should determine whether the municipality relied on evidence that was ''reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent governmental interest." *Alameda Books,* 535 U.S. at 438. Here, under the standard set forth in *Alameda Books,* the court found that genuine issues of fact existed as to whether High Forest Township was reasonable in relying upon the studies that provided the rationale for its ordinance. Primarily, it found persuasive that the studies relied upon by High Forest Township were conducted in metropolitan, not rural, areas, and the studies did not particularly examine the secondary effects of purely take-home fare. In addition, some of the studies were more than 25 years old."); *Dima v. High Forest Township,* 2003 WL 22736561 (D.Minn. 2003)("These ambiguous reports of negative perceptions, however, are not sufficient to meet the City's burden... the additional studies provided by High Forest Township still do not survive the scrutiny of *Alameda Books.*"); *Encore Videos*

v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003)("The city justifies this ordinance on the ground that it will reduce the adverse secondary effects [such as increased crime and the reduction of property values] of sexually oriented businesses. Therefore, in order to demonstrate that the ordinance is narrowly tailored, the city must show that the ordinance addresses these problems."); *R.V.S v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004)(At this stage, courts are 'required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' ' *Ben's Bar,* 316 F.3d at 724 [quoting *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728]. In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must 'examine evidence concerning regulated speech and secondary effects.' *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728."); *22nd Ave Station, Inc. v. City of Minneapolis*, 429 F. Suppp. 2d 1144(D.Minn. 2006)("As the Supreme Court explained in *Alameda,* even if the City has made a facially sufficient factual showing to justify its ordinance, the affected party may cast direct doubt on the City's rationale by showing that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings...If the affected party succeeds in casting direct doubt, 'the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.' Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability of

the foreign studies upon which the City relied. It has submitted its own recent expert analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat. The City has provided no contrary evidence regarding the impact of 22nd Avenue Station on its neighborhood."); *Flanigan's Enterprises Inc. v. Fulton County*, 2006 WL 2927532 (N.D. Ga. 2006)("Fulton County has failed to show that the ordinance furthers an important governmental interest because it did not consider the most comprehensive analysis of the secondary effects of alcohol consumption in adult entertainment establishments. Instead, the defendants, relied on less relevant studies that supported the county's goal. Once again, this court concludes that it was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies; therefore, the ordinance is an unconstitutional restraint on the plaintiffs' constitutional rights under the First Amendment.")

As the above excerpts show, the decisions construing the "shifting burden" of *Alameda Books* are truly "all over the road." What has resulted is exactly what Justice Souter feared, when he articulated his concerns with the haphazard, inconsistent and confusing evaluation (or lack thereof) of ***relevant evidence*** under ***appropriate evidentiary standards***. Those fears were well articulated, and have come to be, and they are adopted by the *Amici* as a very legitimate basis to accept review of the Petition:

> "In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of

the demonstration available... See *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young,* 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation.[FN3]

"FN3. Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 569, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e.g., Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995); *Edenfield v. Fane,* 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.,* at 770-771, 113 S.Ct. 1792. For unless this "critical" requirement is met, *Rubin, supra,* at 487, 115 S.Ct. 1585, "a State could with ease restrict commercial speech in the service of other objectives that could not

themselves justify a burden on commercial expression," *Edenfield, supra,* at 771, 113 S.Ct. 1792.

"Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market***459** value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g.,* ****1747***Renton, supra,* at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440.

"And precisely because this sort of ***evidence*** is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. *See Erie v. Pap's A.M.,* 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.,* at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). [Is this all intended as a

> long block quote?] But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. *See Renton,* 475 U.S., at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.
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> "The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g., Schad v. Mount Ephraim,* 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). " Souter, J., dissenting, 535 U.S. at 458,459.

What is clear is that the instant action shows, perhaps more than any other, that a governmental body, insistent on advancing a perhaps well intended but questionably useful regulation that simply eliminates lawful speech under the cloak of advancing some nebulous "governmental interest," can "pick and choose" what type of "evidence" it relies on in an effort to uphold legislation based, not on any legitimate concern with "secondary effects," but rather predicated on a content-based and discriminatory animus. Absent review and guidance, the same miscarriage of justice represented by the instant action is destined to be repeated, at the expense of the

businesses involved, their employees, their families and, most critically, at the expense of freedom.

CONCLUSION

The state of confusion and chaos involving the rules of evidence as they apply to the evaluation of challenges to adult entertainment legislation is monumental. These conflicts and inconsistencies, stemming from the inability or refusal to apply the "burden shifting" analysis set forth in *Alameda Books,* justify review of this action. Such review is necessary to ensure appropriate clarification of the rampant confusion and conflict with this Court's decisions in this area, all of which show the necessity for this Court to provide clarification, guidance, and precision in this critical area of First Amendment jurisprudence. For these reasons, *Amici* respectfully submit the foregoing additional considerations in support of instant petition for a writ of certiorari. It is respectfully requested that this Court grant review in this action.

Respectfully submitted,

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